Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CROSSWINDS COMMUNITIES, INC.
and BERNARD GLIEBERMAN,
Petitioners,

v.

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

FREDERICK D. ELIAS *
ELLIAS & ELIAS, P.C.
5777 W. Maple Road
Suite 120
West Bloomfield, MI 48322
(248) 865-8400

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Sixth Circuit improperly applied a *de novo* standard of review in reversing the District Court's grant of summary judgment as to Plaintiffs' copyright infringement action based on the equitable doctrine of laches, thereby so far departing from the great deference the appellate court must give to trial court determinations with respect to application of the laches defense, as to require the exercise of this Court's supervisory power under Rule 10(a)?

2. Whether the wide-ranging conflict among the United States Circuit Courts of Appeals as to the appropriate standard for reviewing application of the laches doctrine in intellectual property cases presents a compelling reason for resolution by the United States Supreme Court?

3. Whether the acknowledged split among the United States Circuit Courts of Appeals as to the availability of the laches defense in copyright infringement actions, due to the express statute of limitations of the Copyright Act, 17 U.S.C. §507(b), provides a compelling reason for consideration by the United States Supreme Court?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all parties to the proceeding below. Petitioners, Crosswinds Communities, Inc. and Bernard Glieberman, were defendants in the District Court and appellees in the Court of Appeals. Respondents, Michael A. Chirco and Dominic Moceri, were plaintiffs in the District Court and appellants in the Court of Appeals.

Pursuant to this Court's Rule 29.6, undersigned counsel states that the parent corporation of Crosswinds Communities, Inc. is Strathmore Finance Company, Inc. There is no publicly held company owning 10% or more of Crosswinds Communities, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and judgment of the District Court are unreported and are set forth, respectively, in the Appendix ("App."), App. at 1a and 21a.

The opinion of the U.S. Court of Appeals for the Sixth Circuit (App. at 23a-37a) for which this petition is filed is reported at 474 F3d 227 (6th Cir. 2007).

JURISDICTION

On March 31, 2005, the District Court rendered its opinion and judgment on Defendants' Motion for Summary Judgment based upon the equitable defense of laches.[1] The U.S. Court of Appeals for the Sixth Circuit rendered its opinion on January 10, 2007. The case is docketed in the Court of Appeals as No. 05-0715.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Under 28 U.S.C. §1254(1), this Court may grant a petition for a writ of certiorari to review a case in the Court of Appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISION INVOLVED

This case involves application of the laches defense as it relates to the three year statute of limitations of the Copyright Act, 17 U.S.C. §101 *et seq.* The pertinent provision is 17 U.S.C. §507(b), which states:

> Civil actions. No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

STATEMENT OF THE CASE

Petitioners request that this Court exercise its power and discretion under Rule 10(a) of its rules to grant their writ of certiorari for the compelling reason that this case raises two questions of broad and general importance for intellectual

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[1] Defendants' Motion for Summary Judgment based upon the equitable defense of laches was filed on April 1, 2004. Oral argument on such motion and three other pending motions was held by the district court on July 21, 2004, App. at 38a-59a, and July 22, 2004, App. at 60a-135a. Oral argument as to the laches defense was limited to the July 22, 2004 date. App. at 122a.

property jurisprudence concerning the equitable doctrine of laches, which have not been but should be settled by this Court, and on which the circuits are in serious conflict:

> First, what is the applicable standard for reviewing trial court determinations of the laches defense in intellectual property cases?
>
> Second, is the defense of laches available in a copyright infringement action when such claim is brought within the three year statute of limitations period of the Copyright Act, 17 U.S.C. §507(b)?

The factual setting and procedural posture of the instant case presents an excellent opportunity to resolve both questions. Review of these issues is long overdue by this Court, not only to resolve the wide-ranging conflict among the circuits, but more importantly to provide consistency in the assessment of liability under the Copyright Act, 17 U.S.C. §101 *et seq*. Laches is a fundamental legal doctrine that affects intellectual property jurisprudence, and the resolution of the issues arising from its application would certainly have effects far beyond the parties to this case. Indeed, application of the laches doctrine in the context of copyright infringement is a matter of concern to every copyright holder with notice of a potentially infringing act.

FACTUAL BACKGROUND

A. Plaintiffs' Vigorous Litigious Activity Against Their Competitors

For the past seven years, Plaintiffs have vigorously litigated against their competitors alleging copyright infringement of their 12-unit condominium designed by their architect, Ronald Mayotte.[2] The cases all involve the same

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[2] *Chirco* v *S.R. Acquisitions, LLC*, No. 00-73390 (E.D. Mich., February 4, 2000); *Chirco* v *Charter Oaks Homes*, No. 01-71403 (E.D. Mich., April 10, 2001); *Chirco* v *Hampton Ridge, LLC*, No. 01-72015 (E.D. Mich.,

alleged copyrights and seek to prohibit their competitors from bringing various 12-unit condominiums to the market.

B. The American Heritage Project

In December, 2000, construction on the American Heritage project, a 12-unit condominium development located in Waterford, Michigan commenced. Approximately four months later, on April 10, 2001, Plaintiffs filed suit in the United States District Court for the Eastern District of Michigan, alleging that the American Heritage project infringes on Plaintiffs' alleged copyrights.[3]

In contrast to the haste with which Plaintiffs instituted legal action concerning the American Heritage project, as detailed *infra*, Plaintiffs significantly delayed in instituting suit concerning the Jonathan's Landing development.

C. The Jonathan's Landing Development

1. *Plaintiffs' Complaint*

On November 14, 2003, Plaintiffs filed the instant lawsuit. App. at 136a-142a. Count I of Plaintiffs' Complaint alleges copyright infringement against Crosswinds Communities, Inc. ("Crosswinds"). App. at 140a. Counts II and III apply only to Defendant Bernard Glieberman ("Defendant Glieberman") and allege vicarious and contributory liability for Crosswinds' alleged copyright infringement. App. at 140a-142a.

Plaintiffs' Complaint not only demanded damages, but an injunction and destruction of the plans and purportedly

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May 25, 2001), *Chirco* v *Gateway Oaks, LLC*, No. 02-73188 (E.D. Mich., August 2, 2002); and *Chirco* v *Rosewood, LLC*, No. 03-72045 (E.D. Mich., June 2, 2003).

[3] *Chirco* v *Charter Oaks Homes*, No. 01-71403 (E.D. Mich., April 10, 2001).

copyrighted materials, as well as destruction of the architectural works constructed at Jonathan's Landing. App. at 141a-142a.

2. *Plaintiffs' Lack of Diligence*

In contrast to Plaintiffs' immediate action with respect to the Heritage Development, the evidence reveals that Plaintiffs delayed for at least two years and one month before filing suit claiming copyright infringement with respect to the Jonathan's Landing development, located in Howell Township, Livingston County, Michigan.

The relevant time line is as follows:

January 8, 2001: The Livingston County Drain Commission conditionally approved the plans for the Jonathan's Landing development making the plans containing the allegedly infringing twelve-plex design available for public inspection. App. at 143a (¶3); App. at 146a.

April 24, 2001: At a public hearing, the Howell Township Planning Commission granted preliminary approval to the site plan for Jonathan's Landing. App. at 147a.

October 16, 2001: Counsel for Plaintiffs submitted a request, pursuant to the Michigan Freedom of Information Act ("FOIA"), to Howell Township for the site plan for Jonathan's Landing, reflecting that Plaintiffs knew of the Site Plan Review report dated April 16, 2001 and the Site Plan Review dated April 10, 2001. App. at 148a-149a.

October 22, 2001: Howell Township responded to Plaintiffs' FOIA request, providing a total of 110 pages of Jonathan's Landing documents, including the site plan displaying the allegedly infringing twelve-plex design. App. at 150a.

May, 2002: Ground breaking commenced on the Jonathan's Landing development. App. at 143a (¶2).

May 9, 2002: At the deposition of George Attard, Jr. in *Chirco* v *Hampton Ridge, LLC*,[4] one of the architects who had created the plans for the Jonathan's Landing development, Plaintiffs' counsel admitted having analyzed the construction drawings for the Jonathan's Landing development and opined that they were identical to the purportedly infringing Heritage development plans:5

Q: Now, I take it that you have continuing communications with people at Crosswinds relating to these buildings; is that right? Do you continue to communicate with people at Crosswinds about the project out in Waterford?
A: Yes.
Q: Are you, in fact, involved in drawing for them or working on plans for another condominium community using the Waterford design?
A: Yes.
Q: Where is that other community that you're working with Crosswinds?
A: I believe that's in Howell Township.
Q: What is the name of that community?
A: Jonathan's Landing.
Q: Have you, what is the status of the Jonathan's Landing development?
A: I believe the construction drawings are at the municipality for approval.
Q: Who stamped those construction drawings, you or Mr. Tosch?
A: Mr. Tosch.
Q: Who have [sic in original], have you done direct work on the Jonathan's Landing drawings?
A: Yes, I have.

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[4] *See supra* fn 2.

[5] *See also* App. at 139a (¶18) ("As with the Heritage condominiums, the Jonathan's Landing condominiums are substantially similar to, and copy, the Knollwood Plans, the Aberdeen Plans and the Aberdeen Works").

Q: Are they essentially similar from an architect's view? **From my perspective, having seen those drawings, they seem to be the Heritage drawings, the Waterford Township drawings. Is there any material difference to the drawings other than the fact it's in Howell versus Waterford?**
A: I believe there's some material difference, yes.
Q: What is the material difference you believe to be, to exist?
A: The exterior amount of brick, things of that nature.
Q: What about the floor plans and –
A: **It's primarily the same.**
Q: **And the location of the garages, that sort of thing, it's a twelve unit stacked ranch?**
A: **That's correct.**
Q: **Back to back, right?**
A: **Correct.**

App. at 203a-204a (emphasis added).

Thus, the two years and one month delay in filing the November 14, 2003 Complaint is derived from the date that Howell Township responded to Plaintiffs' FOIA request, October 22, 2001, by providing a total of 110 pages of Jonathan's Landing documents, including the site plan displaying the allegedly infringing twelve-plex design. App. at 150a.

3. *Defendants Relied Upon Plaintiffs To Their Detriment.*

As of the date the instant lawsuit was filed, November 14, 2003, 168 of the 252 units had been constructed, 141 of them sold and 109 already occupied by the buyers. App. at 144a (¶6). By the time Defendants filed their Motion for Summary Judgment based upon the equitable defense of laches, on April 1, 2004, 192 units had been constructed. App. at 144a (¶5).

Plaintiffs' inaction in regards to the Jonathan's Landing project—in stark contrast to their prompt action within

months of commencing construction on the Heritage development[6]—led Defendants to believe that the project was not considered by Plaintiffs to be infringing the alleged copyrights. App. at 144a (¶8). In fact, Defendants relied on Plaintiffs' inaction in moving forward with the Jonathan's Landing development, believing that if Plaintiffs felt there was any possibility of infringement, Plaintiffs would have aggressively protected their rights by filing suit without delay as was their demonstrated proclivity. App. at 144a (¶8).

PROCEEDINGS BELOW

A. The District Court

This action commenced on November 14, 2003. Plaintiffs alleged copyright infringement against Crosswinds and vicarious and contributory liability against Defendant Glieberman for Crosswinds' alleged copyright infringement. The Complaint sought monetary damages and injunctive relief in addition to destruction of the architectural works constructed at Jonathan's Landing. App. at 141a-142a.

On April 1, 2004, Defendants moved for summary judgment on the basis of the equitable doctrine of laches. The district court heard Defendants' Motion for Summary Judgment along with three other dispositive motions on July 21 and 22, 2004 (oral argument as to the laches defenses was limited to the July 22, 2004 hearing date, App. at 122a). In an opinion filed on March 31, 2005, the district court granted Defendants' Motion for Summary Judgment based on the equitable doctrine of laches, App. at 1a; and a Judgment to that effect was entered on the same day. App. at 21a. In its March 31, 2005 opinion, the district court concluded that Plaintiffs failed to show why they did not diligently pursue the claim as to Jonathan's Landing as early as May 9, 2002, or perhaps earlier, in 2001. App. at 17a-19a. The district

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[6] *See supra* fn 3.

court also determined that Defendants had shown prejudice, given that, as of the filing of the Complaint, more than 168 units were built, 109 of which were occupied. *Id.*

B. The Court of Appeals

Pursuant to 28 U.S.C. §1292(a), Plaintiffs filed an appeal as a matter of right from the district court's summary judgment dismissing Plaintiffs' Complaint. The appeal was docketed as appeal number 05-1715. On January 10, 2007, the Sixth Circuit issued its opinion in this matter. App. at 23a.

Applying a *de novo* standard of review, the Sixth Circuit first determined the availability of the laches defense in a copyright infringement case as it relates to the Copyright Act's explicit three year statute of limitations provision, 17 U.S.C. §507(b).

Detailing the conflict among the circuits, the Sixth Circuit held that the laches doctrine is available in a copyright infringement case, however, its use must be restricted to the "most compelling of cases." App. at 31a.

Having affirmed the availability of the laches defense in copyright infringement cases in the Sixth Circuit, a pure question of law, the appellate court then assigned itself the task of determining whether Plaintiffs were less than diligent in pursuing their copyright infringement claim against Defendants and, if so, whether the failure of Plaintiffs to file suit in a timely manner resulted in undue prejudice to the alleged infringers. App. at 33a.

Giving no deference to the trial court's determination, the appellate court held:

> To the extent that the plaintiffs seek only the monetary damages and injunctive relief allowed by the Copyright Act for violation of the statute's provisions, see 17 U.S.C § 502 (allowing injunctive relief to prevent or restrain infringement of a copyright); § 503 (permitting

> destruction or disposition of all copies made or used in violation of a copyright owners's rights); § 504 (providing for actual damages and profits or statutory damages for copyright infringement); § 505 (recognizing the right to recover costs and attorney's fees), we cannot conclude that the defendants were unduly prejudiced by the plaintiffs' delay in filing this cause of action.

App. at 35a. Again, applying a *de novo* standard of review, the appellate court reversed the district court's judgment, but affirmed the district court's determination that Plaintiffs' inordinate lengthy delay in filing this suit makes any effort to procure the destruction of buildings already occupied, sold, or substantially constructed unduly prejudicial to Defendants. App. at 35a-36a.

REASONS FOR GRANTING THE WRIT

"Laches," is derived from the Old French lasche ("lax"), an expression for the equity maxim that equity aids the vigilant, not those who sleep on their rights. Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE 169-81 (5th ed., 1941). The doctrine of laches in the law of intellectual property is descended from the original equity conception. *See McLean* v *Fleming*, 96 U.S. 245 (1878); and *Menendez* v *Holt*, 128 U.S. 514 (1988).

In the copyright context, the most-repeated justification for the doctrine was penned by Judge Learned Hand:

> It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.

Haas v *Leo Feist, Inc*, 234 F. 105, 108 (S.D. N.Y. 1916). Unlike statutes of limitations, "laches is not . . . a mere matter

of time, but principally a question of the inequity of permitting the claim to be enforced." *Holmberg* v *Armbrecht*, 327 U.S. 392, 396 (1946).

To establish the defense of laches, a party must show: (1) lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting it. *Herman Miller, Inc.* v *Palazzetti Imports and Exports, Inc*, 270 F.3d 298, 317-18 (6th Cir. 2001).

I. THE SIXTH CIRCUIT SIGNIFICANTLY DEPARTED FROM THE GREAT DEFERENCE THE APPELLATE COURT MUST GIVE TO TRIAL COURT DETERMINATIONS WITH RESPECT TO APPLICATION OF THE LACHES DEFENSE.

As a preliminary matter, the Sixth Circuit improperly applied a *de novo* standard of review in reversing the District Court's grant of summary judgment of Plaintiffs' copyright infringement action based on the equitable doctrine of laches. In doing so, the Sixth Circuit radically departed from the great deference the appellate court must give to trial court determinations with respect to application of the laches defense.

While the appellate court correctly determined that the threshold question—whether the laches defense is applicable is a matter to be reviewed *de novo*, it erred when, having determined the availability of the doctrine in the Sixth Circuit, it gave no deference whatsoever to the trial court's factual determination of Plaintiffs' unreasonable delay and undue prejudice to Defendants.[7]

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[7] As discussed in Section II of this Petition, Petitioners submit that the trial court's application of the doctrine is a mixed question of law and fact.

The appellate court mistakenly relied upon *Kellogg* v *Toucan Golf, Inc*, 337 F.3d 616, 623 (6th Cir. 2001), for the proposition that *de novo* review was appropriate. In fact, the *Kellogg* case did not address the laches doctrine at all. Rather, the case involves an appeal from a decision of the Trademark Trial and Appeal Board to permit the registration of a word mark, "Toucan Gold," by defendant manufacturer of promotional golf equipment. 337 F.3d at 620. The Sixth Circuit in *Kellogg* affirmed that review of the district court's legal conclusions is *de novo*, but also held that factual findings must be reviewed for clear error. *Id.* at 623.

In the Sixth Circuit, a district court's determination as to application of the laches defense should only be reversed if "clearly erroneous," although the Sixth Circuit sometimes inaccurately refers to the standard as "abuse of discretion," effectively, a misnomer:

> A district court abuses its discretion when it relies on ***clearly erroneous*** findings of fact or when it improperly applies the law. *Christian Schmidt Brewing Co* v *G. Heileman Brewing Co*, 753 F2d 1354, 1356 (6th Cir. 1985). An abuse of discretion is defined as a definite and firm conviction that the district court committed a ***clear error*** of judgment. *See Pouillon* v *City of Owosso*, 206 F.3d 711, 714 (6th Cir. 2000).

Herman Miller, Inc v *Palazzetti Imports and Exports, Inc*, 270 F.3d 298, 317-18 (6th Cir. 2001) (emphasis added). *See also Watkins* v *Northwestern Ohio Tractor Pullers Ass'n, Inc*, 630 F.2d 1155, 1163-64 (6th Cir. 1980) (a "finding of laches based on all the circumstances in the case is a matter within the trial court's discretion and will not be set aside unless an abuse of discretion has been shown") *citing American Home Products Corp* v *Lockwood Manufacturing Co*, 483 F.2d 1120, 1124-1125 (6th Cir. 1973) ("an issue of fact, a finding of laches cannot be disturbed unless it has been shown to be clearly erroneous under FRCP 52(a) and, as a question

addressed to the discretion of the district court, it will not be disturbed unless an abuse of discretion has been shown") and *General Electric Co* v *Sciaky Bros, Inc*, 304 F.2d 724, 727 (6th Cir. 1962) (the determination of laches by the trial court is supported by substantial evidence and is not clearly erroneous).

The "clearly erroneous" standard is consistent with Rule 52(a) of the Federal Rules of Civil Procedure ("[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless ***clearly erroneous***")(emphasis added). *See also Burnett* v *NY Central Railroad Co*, 380 U.S. 424, 435 (1965) (whether laches bars an action in a given case depends upon the circumstances of that case and "is a question primarily addressed to the discretion of the trial court") *citing Gardner* v *Panama Railroad Co*, 342 U.S. 29, 30-31 (1951).

In its opinion in this case, the appellate court acknowledged that, "[o]rdinarily, an appellate court reviews 'a district court's resolution of a laches question for an abuse of discretion.'" App. at 24a *citing City of Wyandotte* v *Consolidated Rail Corp*, 262 F.3d 581, 589 (6th Cir. 2001), but gave no explanation for its departure from this standard after having reached the threshold question as to the applicability of the laches defense. In holding that a district court's resolution of a laches question is reviewed for an abuse of discretion, the Sixth Circuit in *City of Wyandotte* relied upon *Thropp* v *Bache Halsey Stuart Shields, Inc*, 650 F.2d 817, 823 (6th Cir. 1981). In *Thropp*, the Sixth Circuit reviewed a judgment in favor of plaintiff on claims of breach of fiduciary duty, contract and conversion. 650 F.2d at 818. In reviewing the district court's determination that the plaintiff's claims were not barred by laches, the Sixth Circuit stated the "scope of our review is limited by the 'clearly erroneous' standard of Rule 52(a) of the Federal Rules of Civil Procedure." 650 F.2d at 818. In affirming judgment in plaintiffs' favor, the

Sixth Circuit concluded that none of the facts found by the district court were "clearly erroneous." *Id. Cf. Herman Miller, Inc, supra*, 270 F.3d at 320 (stating that a district court's review of summary judgment is *de novo*, but concluding that district court did not "err" in finding laches in granting summary judgment to defendant as to plaintiff's trade dress claims).

It is precisely this well-established deferential standard of review which the Sixth Circuit inexplicably disregarded in this case when it substituted its own determination of the facts and reversed the District Court's grant of summary judgment based on the laches defense. For such reason, Defendants respectfully request that this Court exercise its supervisory power under Rule 10(a) to reverse the Sixth Circuit's improper *de novo* review of the trial court's determination as to Plaintiffs' unreasonable delay and undue prejudice to Defendants.

II. THE CIRCUITS ARE DIVIDED AS TO THE APPROPRIATE STANDARD OF REVIEW FOR APPLICATION OF THE LACHES DOCTRINE IN INTELLECTUAL PROPERTY CASES.

Laches is an important and often-utilized doctrine in intellectual property law, thus, the standard of review for this doctrine is in need of uniform application. However, the standards of review among the circuits are in wide disarray.

In some instances, the circuit courts utilize the same "abuse of discretion" misnomer as the Sixth Circuit. The abuse of discretion standard has perhaps become so entrenched because of the following syllogism: "laches is an equitable doctrine; equitable relief is discretionary; therefore, the grant or denial of such relief can be reviewed only for abuse of discretion." However, the clearly erroneous standard of Rule 52(a) is the old equity standard. *United States* v *United States*

Gypsum Co, 333 U.S. 364, 394-95 (1948); 5A MOORE'S FEDERAL PRACTICE ¶52.03[1] at p. 52 (2d ed. 1984).

The First Circuit has defined "abuse of discretion" as occurring "when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits palpable error of judgment in calibrating the decisional scales." *Murphy* v *Timberlane Regional School District*, 22 F.3d 1186, 1189-1190 (1st Cir. 1994). On the other hand, "clear error" has been described by the Ninth Circuit as follows: "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse even though . . . we would have weighed the evidence differently." *Reno Air Racing Ass'n, Inc* v *McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006)

Illustrative of the confusion between the "abuse of discretion" and "clearly erroneous" standard is the Ninth Circuit's avoidance of adopting either standard, by noting that the distinction that may exist between the two standards is "immaterial" or "not outcome determinative." *Danjaq, LLC* v *Sony Corp*, 263 F.3d 942, 952 (9th Cir. 2001) (in affirming dismissal of copyright infringement action, "we conclude that the district court's ruling on laches must stand regardless whether it is reviewed for abuse of discretion or for clear error"); *Grupo Gigante SA De CV* v *Dallo & Co*, 391 F.3d 1088, 1103 (9th Cir. 2004) (declining to resolve the issue of the appropriate standard because difference between standards was not "outcome determinative" given that the district court "neither committed clear error nor abused its discretion" in granting summary judgment in an action for trademark infringement on the basis of laches). *Cf. Reno Air Racing Ass'n, Inc, supra,* 452 F.3d at 1135 (trial court's determination of likelihood of confusion on trademark infringement claim is reviewed for clear error).

Adding further to the confusion, the Seventh Circuit's standard of review is "clear abuse of discretion." For example, in *Piper Aircraft Corp* v *Wag-Aero, Inc*, the appellate court affirmed a judgment on plaintiff's trademark infringement claim, finding that laches did not preclude the granting of a permanent injunction:

> [T]he determination whether delay is unreasonable, inexcusable, and prejudicial rests within the 'sound discretion of the trial court' and we will not disturb the trial court's determination absent a ***'clear abuse' of that discretion***.

741 F2d 925, 932 (7th Cir. 1984) (emphasis added) *citing Blue Ribbon Feed Co* v *Farmers Union Central Exchange, Inc*, 731 F2d 415, 420 (7th Cir. 1984) and *Baker Mfg Co* v *Whitewater Mfg Co*, 430 F.2d 1008, 1009 (7th Cir. 1970).

In the Fourth Circuit, invocation of laches is within the sound discretion of the district court and will be reversed only if clearly erroneous. *Lyons Partnership, LP* v *Morris Costumes, Inc*, 243 F.2d 789, 797 (4th Cir. 2001) *citing Potter Instrument Co* v *Storage Tech Corp*, 641 F2d 190, 191 (4th Cir. 1981).

Yet in the Third Circuit the standard of review is a hybrid: pure questions of fact are reviewed under the clearly erroneous standard, *see e.g. Santana Products, Inc* v *Bobrick Washroom Equipment, Inc*, 401 F.3d 123, 138 (3d Cir. 2005) (the length of delay is a question of fact which is reviewed under the clearly erroneous standard), while "balancing of the equities" is reviewed for abuse of discretion, *see e.g. Bermuda Express, NV* v *M/V Litsa*, 872 F.2d 554, 557 (3rd Cir. 1989).

In the Tenth Circuit, the abuse of discretion standard is only used when reviewing a district court's application of the laches defense after a bench trial; on summary judgment, the district court's judgment must be reviewed *de novo*.

Jacobsen v *Deseret Book Co*, 287 F.3d 936, 948 (10th Cir. 2002).

Petitioners proffer that a district court's determination of the laches defense should only be reversed if clearly erroneous consistent with determinations of most mixed questions of law and fact in intellectual property cases. *See e.g. Piper Aircraft Corp*, *supra*, 741 F2d at 936-37 (Posner, J.) (concurring opinion).[8] Petitioners further submit that the *de novo* standard of review should be confined to district court rulings on only pure issues of law, such as the threshold question of whether laches is a valid defense to the particular cause of action, *Grupo Gigante SA De CV*, *supra*, 391 F.3d at 1102 *citing Jarrow Formulas, Inc* v *Nutrition Now, Inc*, 304 F.3d 829, 834 (9th Cir. 2002), or whether there exists a willfulness counterdefense to laches, *see e.g. Jackson* v *Axton*, 25 F.3d 884, 886 (9th Cir. 1994).[9]

The confusing disarray of positions among the circuits presents a compelling reason for this Court to clarify the standard of review in order to establish uniform application of the laches doctrine in intellectual property cases. For such reason, Petitioners respectfully request that this Court adopt

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[8] The following are examples of mixed law and fact questions in intellectual property cases in which the clearly erroneous standard of review has been utilized: similarity, *Original Appalachian Artworks, Inc* v *Toy Loft, Inc*, 684 F.2d 821, 825 (11th Cir. 1982), *Williams* v *Kaag Mfrs, Inc*, 338 F2d 949, 951 (9th Cir. 1964); copying, *GR Leonard & Co* v *Stack*, 386 F.2d 38 (7th Cir. 1967); access, *Shurr* v *Warner Bros Pictures, Inc*, 144 F.2d 200, 203 (2nd Cir. 1944); fair use in copyright cases, *Eisenschiml* v *Fawcett Publications, Inc*, 246 F.2d 598, 604 (7th Cir. 1957), *MCA, Inc* v *Wilson*, 677 F.2d 180, 183 (2nd Cir. 1981); and likelihood of confusion in trademark cases, *Hills Bros Coffee, Inc* v *Hills Supermarkets, Inc*, 428 F.2d 379, 380 (2nd Cir. 1970), *Beatrice Foods Co* v *Neosho Valley Coop Creamery Ass'n*, 297 F.2d 447, 449 (10th Cir. 1961).

[9] *Jackson* later was abrogated on other grounds. *See Fogerty* v *Fantasy, Inc*, 510 U.S. 517 (1994).

the clearly erroneous standard consistent with Rule 52(a) of the Federal Rules of Civil Procedure.

III. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT REGARDING THE AVAILABILITY OF THE LACHES DEFENSE IN A COPYRIGHT INFRINGEMENT ACTION DUE TO THE EXPRESS STATUTE OF LIMITATIONS PROVISION OF THE COPYRIGHT ACT.

In the present case, the Sixth Circuit held that the laches doctrine is available in a copyright infringement case, however, its use must be restricted to the "most compelling of cases." App. at 31a. In so ruling, the Sixth Circuit acknowledged the split among the circuits, as detailed *infra*. *Id.* The Copyright Act provides an express statute of limitations provision in contrast to the Lanham Act, 15 U.S.C. §1000 *et seq*., which does not contain a limitations provision. Accordingly, for ease of analysis, Petitioners will limit examination of the circuit split to cases involving copyright infringement claims.

A. The Fourth and Tenth Circuits

Both the Fourth and Tenth Circuits have declined to apply the doctrine of laches in cases with a statute providing an express limitations period, the rationale being that separation of powers precludes a court from applying the judicially-created doctrine of laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under the statute.

For example, in *Lyons Partnership, LP*, *supra*, the Fourth Circuit addressed claims of trademark and copyright infringement by plaintiff owner of "Barney," the famous purple dinosaur, for purposes of ending the marketing of three look-alike costumes. 243 F.3d 789 (4th Cir. 2001). The trial court had denied plaintiff a remedy, in pertinent part, because of the

doctrine of laches, holding that the four-year lapse between the time when plaintiff owner became aware of the acts of infringement and the commencement date of the lawsuit was inexcusable. 243 F.3d at 796 & 797.

However, the Fourth Circuit reversed the trial court's ruling that any claims were barred by laches for the reason that "separation of powers principles dictate that an equitable timeliness rule adopted by courts cannot bar claims that are brought within the legislatively prescribed statute of limitations." *Id.* at 797. Thus, in view of the Copyright Act's three year limitations provision, 17 U.S.C. §507(b), "a court is not free to shorten the limitations period." *Id.* at 798.

The Tenth Circuit's prohibition is not quite as stringent as that of the Fourth Circuit. In *Jacobsen* v *Deseret Book Co*, the Tenth Circuit reversed a trial court's grant of summary judgment on a copyright infringement claim on the basis of laches, stating: "[r]ather than deciding copyright cases on the issue of laches, courts should ***generally*** defer to the three-year statute of limitations, 17 U.S.C. §507(b), provided by the Copyright Act." 287 F.3d 936, 950 (10th Cir. 2002) (emphasis added). Because the copyright owner in *Jacobsen* filed suit less than three years after publication of the allegedly infringing work, the appellate court concluded "it does not seem unreasonable to allow [plaintiff] three years from the time he should have known of his claim to evaluate the viability of instituting a lawsuit or pursue out-of-court remedies." *Id.* at 951.

B. The Ninth Circuit

In contrast, the Ninth Circuit allows liberal application of the laches defense in copyright infringement cases though such claim may be timely under the statute of limitations.

In *Danjaq, LLC*, *supra*, the Ninth Circuit affirmed the trial court's dismissal of a copyright action on the basis of laches

even though such claim was brought within the statute of limitations, explaining that the crucial consideration in such cases is whether the delay which occasions the required prejudice is reasonable:

> Delay has been held permissible . . . when it is necessitated by the exhaustion of remedies through the administrative process, when it is used to evaluate and prepare a complicated claim, and when its purpose is to determine whether the scope of proposed infringement will justify the cost of litigation. By contrast, delay is impermissible when its purpose is to capitalize on the value of the alleged infringer's labor, by determining whether the infringing conduct will be profitable.

263 F.3d at 954 *citing in pertinent part Kling* v *Hallmark Cards, Inc*, 225 F.3d 1030, 1039 (9th Cir. 2000); and *Jackson*, *supra*, 25 F.3d at 886.

C. The Sixth Circuit

In the present case, the Sixth Circuit explained its position as carving out a "middle ground" between the prohibition in the Fourth and Tenth Circuits and the somewhat more expansive application by the Ninth Circuit: "a flat proscription such as that invoked by the Fourth Circuit against the defense of laches in cases involving a federal statutory claim is both unnecessary and unwise." App. at 30a.

The Sixth Circuit first explicitly recognized the doctrine of laches as applicable in copyright infringement cases a quarter century ago in *Hoste* v *Radio Corp of America*, 654 F.2d 11, 12 (6th Cir. 1981). In *Hoste*, the trial court had granted summary judgment to the defendant, however, the Sixth Circuit remanded the action to trial court for further development of the prejudice to defendants resulting from plaintiff's delay in filing his claim for copyright infringement. 654 F.2d at 12.

In *Broadcast Music, Inc* v *Roger Miller Music, Inc*, though *dicta*, the Sixth Circuit noted "[a]lthough circuits are split as to whether laches is available as a defense under the Copyright Act, laches is available as an affirmative defense in a copyright action in the Sixth Circuit." 396 F.3d 762, 783 n. 13 (6th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005).

Demonstrably, the circuits are fractured in their understanding as to the availability of the laches defense within the limitations period of the Copyright Act, thus, certiorari is necessary to resolve such conflict. The issue here involves a fundamental legal doctrine that affects intellectual property jurisprudence, the resolution of which would certainly have effects far beyond the parties to this case. Indeed, application of the laches doctrine in the context of copyright infringement is a matter of concern to every copyright holder with notice of potentially infringing act.

CONCLUSION

For the foregoing reas~~ons; Cross~~winds Communities, Inc. and Bernard Glieberman respectfully request that the Court grant their petition for certiorari.

Respectfully submitted,

FREDERICK D. ELIAS *
ELLIAS & ELIAS, P.C.
5777 W. Maple Road
Suite 120
West Bloomfield, MI 48322
(248) 865-8400

Counsel for Petitioners

* Counsel of Record

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 01-CV-71403-DT
Honorable Denise Page Hood

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiffs,

v.

CHARTER OAKS HOMES, INC., *et al.*,

and

Case No: 03-CV-74600-DT
Honorable Denise Page Hood

CROSSWINDS COMMUNITIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER AND
NOTICE OF STATUS CONFERENCE

I. INTRODUCTION

A. Case No. 01-CV-71403-DT

Plaintiffs Michael A. Chirco and Dominic Moceri filed the instant suit against Defendants Charter Oak Homes, Inc., American Heritage Homes, L.L.C., Bernard Glieberman ("the Charter Oak Homes Defendants") and Progressive Associ-

ates, Inc. ("Progressive"). Plaintiffs' First Amended Complaint filed on November 7, 2001 alleges: copyright infringement (Count I); false designation of origin under the Lanham Act, 15 U.S.C. § 1125 (Count II; and unfair competition and unfair trade practices under M.C.L.A. § 445.903 and the common law (Count III). Count III was dismissed on November 7, 2002 pursuant to the parties' stipulation. In an October 10, 2003 Memorandum Opinion and Order, the Court denied Defendants Charter Oak Homes and Glieberman's Motions for Summary Judgment as to the remaining Counts I and II.

On November 26, 2001, the Charter Oak Homes Defendants filed a First Amended Counterclaim in this matter alleging: Plaintiffs' copyrights are invalid (Count I); the copyrights are not infringed (Count II); copyright misuse because Plaintiffs protected ideas instead of the expression of ideas (Count III); copyright misuse in violation of 17 U.S.C. § 101 (Count IV); slander based on filing of improper notice of lis pendens (Count V); tortious interference of business relationship (Count VI); and, violation of the Michigan antitrust law, M.C.L. § 445.771 (Count VII). Defendants have withdrawn Count VI, tortious interference with contracts and business relationships and the Court so dismissed it in its October 10, 2003 Memorandum Opinion and Order.

Defendant Progressive filed its First Amended Counterclaim on December 3, 2001, seeking a declaratory judgment that Defendant Progressive did not infringe the copyrights, that the copyrights are invalid and unenforceable and that it did not engage in unfair competition pursuant to 15 U.S.C. § 1925(a).

B. Case No. 03-CV-74600-DT

On November 14, 2003, Plaintiffs filed the suit against Defendants Bernard Glieberman and Crosswinds Communities, Incorporated alleging three counts: Copyright Infringement, in violation of 17 U.S.C. § 504(b) (Count I); Vicarious

Liability (Count II); and Contributory Liability (Count III). Defendants filed a Counterclaim on December 19, 2003 claiming that the Copyright Registrations are invalid, were not infringed and are unenforceable.

C. Registered Copyrights

There are four registered copyrights at issue: 1) the Aberdeen Village architectural works or building (VAu356-235); 2) the Aberdeen Village architectural drawings or plans (VAu356-236); 3) the Knollwood architectural works (building) (VAu356-237); and 4) the Knollwood architectural drawings or plans (VAu356-238). The copyrights were granted on November 28, 1997.

This matter is before the Court on various motions. Responses and replies have been filed.

II. ANALYSIS

A. Plaintiffs' Motion to Strike Defendants' Rule 56 Motion for Summary Judgment based on the Supreme Court case, *Dastar*, and Defendants' Rule 56 Motion of Dismissal of Count II (Violation of the Lanham Act) pursuant to recent Supreme Court case of *Dastar*

On March 5, 2004, the Charter Oak Homes Defendants filed a "Rule 56 Motion for Summary Judgment Dismissal of Count II (Violation of the Lanham Act) Pursuant to Recent Supreme Court Decision in *Dastar*." Defendant Progressive filed a joinder to the motion. Plaintiffs filed a response to the motion, along with a Motion to Strike the motion. Plaintiffs claim that the issue was raised in connection with the Charter Oak Homes Defendants' previous motion for summary judgment based on the Lanham Act, Count II of the First Amended Complaint. The Court denied the motion in its October 10, 2003 Memorandum Opinion and Order. The instant motion is a motion for reconsideration which should have been brought within ten (10) days after entry of the

order pursuant to Local Rule 7.1(g). Plaintiffs claim the instant motion is untimely.

The Charter Oak Homes Defendants filed their original Motion for Summary Judgment as to Count II of the First Amended Complaint on January 21, 2003. The argument raised in the original motion and brief was that Plaintiffs failed to factually support their claim under the Lanham Act. Plaintiffs responded to that argument on February 10, 2003 and Defendants filed a reply on February 26, 2003. The hearing on this motion was held on March 12, 2003.

On June 2, 2003, the Supreme Court issued its opinion in *Dastar v. Twentieth Century Fox*, 539 U.S. 23 (2003). On June 18, 2003, the Charter Oak Homes Defendants submitted a letter to the Court attaching for the Court's review a copy of *Dastar*, followed by a filed document entitled, "Supplemental Citation of Recent Supreme Court Case Relevant to Defendants' Motion for Summary Judgment Dismissal of Count II," dated July 3, 2003. In their June 2 and June 18, 2003 submissions, the Charter Oak Homes Defendants raised a new argument that under *Dastar*, the Supreme Court has defined for the first time the term "origin of goods" which means the "producer" of tangible goods, not the "author" of any underlying copyrights. Plaintiffs filed a response to Defendants' Interpretation of the *Dastar* decision on July 18, 2003.

The Court notes that neither party sought leave to file the supplemental briefs pursuant to E.D. Mich. LR 7.1. The Court further notes that its October 10, 2003 Memorandum Opinion and Order, in denying the Charter Oak Homes Defendants' summary judgment as to Count II the Lanham Act, does not specifically address the *Dastar* decision. The Court also notes that no motions for reconsideration were filed within the ten days after the Court issued its October 10, 2003 Memorandum Opinion and Order.

Local Rule 7.1(g) provides that any motion for reconsideration must be filed within ten days of the order. The movant must show a palpable defect that misled the court and the parties and that correcting the defect will result in a different disposition of the case. E.D. Mich. L.R. 7.1(g)(3). The court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. E.D. Mich. L.R. 7.1(g)(3).

A review of the Charter Oak Homes Defendants' most recent summary judgment motion based on the *Dastar* decision reveals that the same argument was raised in their supplemental letter and brief. That issue was fully briefed and responded to by Plaintiffs. Although the Court did not address the *Dastar* case specifically, by implication, the Court denied the Charter Oak Homes Defendants' arguments based on *Dastar*. The Charter Oak Homes Defendants should have filed a Motion for Reconsideration within ten days of the Court's October 10, 2003 Memorandum Opinion and Order if they believed the Court failed to properly address their supplemental briefs. The motion based on *Dastar* is untimely.

Even if the recent motion is timely, Defendants have not shown that there was a palpable defect in the Court's October 10, 2003 Memorandum Opinion and Order. The Court agrees with Defendants that the Supreme Court did define the term "origin of goods" under § 43(a) of the Lanham. Act. The Supreme Court stated,

> In sum, reading the phrase "origin of goods" in the Lanham Act in accordance with the Act's common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were),* we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. Cf. 17

> U.S.C. § 202 (distinguishing between a copyrighted work and "any material object in which the work is embodied"). To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do. See *Eldred v. Ashcroft,* 537 U.S. 186, 208, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003).

Dastar, 539 U.S. at 37. However, the Supreme Court was careful to note that the videos at issue were copied from works which were in the public domain—that the copyright had expired on those works. *Id.* at 32. The Supreme Court noted that "[r]eading 'origin' in § 43(a) to require attribution of *uncopyrighted* materials would pose serious practical problems. Without a copyrighted work as the *basepoint,* the word 'origin' has no discernable limits." *Id.* at 34. Based on this language, the Supreme Court's definition of "origin" uses as a basepoint a "copyrighted" material. If the work is "uncopyrighted" or is in the "public domain," then the definition of "origin" in *Dastar* would apply since the Supreme Court has noted that it does not believe that "the Lanham Act requires this search for the source of the Nile and all its tributaries." *Id. at* 38.

Plaintiff's Motion to Strike Defendant's Motion based on *Dastar* is granted and Defendants' summary judgment motion based on *Dastar* and Progressive's joinder in the motion are denied.

B. Defendants' Motions for Summary Judgment in Case No. 01-71403

1. Summary Judgment Standard

Rule 56(c) provides that summary judgment should be entered only where "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judg-

ment as a matter of law." The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material Facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp, v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

2. Defendants' Motion for Summary Judgment that the Design of the Knollwood Building is not protected by copyright law and must be filtered out

The Charter Oak Defendants claim that before the Architectural Works Copyright Protection Act ("AWCPA"), architectural works, defined as the design of a building, could not be protected by copyright. 37 U.S.C. § 101. The AWCPA protects architectural works that are embodied in a building, architectural plans or drawings which were not published or constructed before the December 1, 1990 enactment date of the AWCPA. 37 C.F.R. 207.11(d)(3).

Defendants claim that the Knollwood buildings embodying the Knollwood building design as illustrated in the Knollwood drawings or plans were constructed by Plaintiffs before December 1, 1990. Plaintiffs have acknowledged in their depositions that the design was published since at least 1989. (Moceri Dep., pp. 104-110). Defendants request that this Court "filter out" the unprotected design of the Knollwood building in considering whether the Defendants' accused buildings or plans are substantially similar to the Knollwood plans or drawings of buildings pursuant to *Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003) and *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004). Defendants claim the Court is now required to "filter out" unprotected elements based on these two recent Sixth Circuit cases.

It is noted that this Court cited the *Kohus* case in its October 10, 2003 Memorandum Opinion and Order. The *Murray Hill* ease expands on the *Kohus* case. it is further noted that the issue of the validity of the copyright and the public domain argument, although raised by Defendants in the context of the Aberdeen Village plans, was addressed by the Court in its October 10, 2003 Memorandum Opinion and Order. The same reasoning applies to the Knollwood plans especially since the Knollwood plans were also discussed in the prior motions and in this Court's opinion. Defendants could have raised the pre-1990 arguments in accordance with the prior scheduling order.

Defendants essentially argue that elements of the Knollwood copyrights are invalid because some of the elements or design were constructed prior to 1990. The copyrights in the Knollwood architectural works (building) (VAu356-237) and the Knollwood architectural drawings or plans (VAu356-238) were granted on November 28, 1997. There is no dispute that the Knollwood buildings were constructed prior to 1990. Although a copyright in an original work would not carry forward to the new and derivative work, the registration of a

derivative work would relate back to include the original, protected work. *Murray Hill Publications, Inc. v. ABC Comm., Inc.*, 264 F.3d 622, 632 (6th Cir. 2001). In order to show validity in the derivative work, a copyright owner must register the derivative work with the Copyright Office as a prerequisite to bringing a copyright suit based on the new and derivative work. *Id.* Plaintiffs have done so in this case, Ownership of a valid copyright automatically creates a right to create "derivative" works based on copyrighted work under 17 U.S.C. § 106(2). Registration of the derivative work is sufficient to allow *an infringement* claim based on copying of material either newly added or contained in the underlying work. *Murray Hill*, 264 F.3d at 630. Under section 106 of the Copyright Act, the copyright owner alone has the exclusive right to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work and to distribute copies of the work. *Microsoft Corp. v. Compusource Distributors, Inc.*, 115 F.Supp.2d 800, 804-805 (E.D. Mich. 2000). In general, publication of a derivative work does not affect the validity of a copyright in the preexisting work, despite the incorporation of the underlying derivative work. *Stewart v. Abend*, 495 U.S. 207, 223 (1990).

There is no dispute that the derivative works of the Knollwood plan were registered. There is also no dispute that Plaintiffs are the owners of both the original Knollwood plans and the derivative works the Aberdeen plans. Although Plaintiffs have published the underlying plans and they are in the public domain, as the Supreme Court has ruled, publication of a derivative work does not affect the validity of a copyright in the preexisting work. *Stewart*, 495 U.S. at 223. A copyright owner should not be stripped of the protections under the copyright laws because a municipality requires certain plans to be submitted to the municipality to obtain approval to build. Defendants are unable to show that the copyrighted Knollwood plans are invalid because the plans are derivative work and are in the public domain.

As to the "filtering out" process Defendants request, because they cannot show that the elements of the Knollwood plans are invalid or are not protectible, the process need not be employed. However, as the Court addressed in its October 10, 2003 opinion, the Sixth Circuit has established a two-step approach to determine substantial similarity: 1) identify which aspects of the artist's work, if any, are protectible by copyright; and, 2) determine whether the allegedly infringing work is substantially similar to protectible elements of the artist's work based on the judgment of an ordinary reasonable observer. *Kohus*, 328 F.3d at 855-56; *Murray Hill*, 361 F.3d at 318 (noting the test in *Kohus*).

Even if Defendants could show that some of the elements of the Knollwood designs are not protectible, Defendants have failed to identify which aspects of the artist's work are protectible, as required by the first step. Defendants seek an evidentiary hearing on this issue, but Rule 56 does not so provide. Rule 56(c) provides that summary judgment should be entered only where "the pleadings, depositions, answers to the interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Defendants, as the moving party, have failed to initially show which elements are protectible, or not protectible. Nothing in their motion and brief identifies the specific elements that they argue are net protectible. Defendants' Motion for Summary Judgment that the design of the Knollwood Building is not protected and must be filtered out is denied.

3. Defendants' Rule 56 Motion for Partial Summary Judgment Dismissal of Count I (Violation of Copyright Act Claims of Reproducing and Distributing)

Defendants seek summary judgment on the limited issue under 17 U.S.C. §§ 106(1) and (3) that the exclusive right to reproduce and distribute the plans has been violated. Defen-

dants specifically left the issue of whether there has been a violation of 17 U.S.C. § 106(2), the exclusive right to make derivative works, for the jury to decide. (Br., p. ii) Plaintiffs' response focused on the issue to "make derivative works" and did not address the issues of reproduction and distribution of the plans.

Defendants claim that the Amended Complaint specifically states a claim that Defendants "reproduced" or distributed" copies of the Knollwood and Architectural Plans. The only claim is that Defendants made "derivative works" of the Plans. (¶ 25, Amended Complaint) Although Plaintiffs may argue that "reproduce" is equivalent to "copying" as pled in Paragraph 25 of the Complaint, Plaintiffs have no evidence that Defendants actually copied the Plans. Plaintiffs' expert, Charles Merz, testified that the Knollwood and Aberdeen plans were not reproduced by the Defendants and he has no evidence that they were distributed. (Merz March 23, 2004 Dep., p. 41) Plaintiffs' other witnesses do not dispute this fact. Plaintiff Dominic Moceri testified that he has no personal knowledge of Defendants ever reproducing or distributing the Knollwood or Aberdeen Village plans. (Moceri Dep., p. 104) Plaintiff Michael Chirco testified that he had no evidence that Defendants reproduced the Knollwood or Aberdeen Village drawings. (Chirco Dep., pp. 69-70) Defendants' expert, Douglas Johnson, testified that the Heritage drawings were not a reproduction of the Knollwood or Aberdeen Village Plans. (Johnson Dep., p. 12) As to distribution, Plaintiffs' expert testified that he had no knowledge that any of the defendants distributed any copies of the Knollwood or Aberdeen Village drawings. (Merz Dep., p. 113)

Plaintiffs have not submitted any evidence to show that Defendants is reproduced or distributed copies of the Knollwood or Aberdeen Village drawings in violation of 17 U.S.C. §§ 106(1) and (3). Summary judgment is granted as to those claims. The claim under 17 U.S.C. § 106(2) (derivative works) remains.

4. Defendants' Motion for Partial Summary Judgment of Non-Infringement of the Knollwood Copyrighted Plans (VAu 356-238)

As noted above, the issues of "reproduction" and "distribution" have been addressed as to both Plans. Defendants now seek a non-infringement ruling on the Knollwood Plan based on the testimony by Mr. Merz that there was no reproduction of the Knollwood Plan and Plaintiffs cannot show Defendants have access to the Plan. The arguments raised in this motion as to the Knollwood Plan is essentially the same as those raised in Defendants' earlier motion as to the Aberdeen Village Plan. As this Court noted in its October 10, 2003 opinion, Defendants argued in their prior motion regarding the Aberdeen Village Plan that the Aberdeen Village plans are "derivative works" based upon incorporated material found in the public domain, specifically, the Knollwood buildings which were constructed many years before the Aberdeen Village plans were drawn. Any argument regarding the Knollwood Plans could have been incorporated in Defendants' arguments regarding the Aberdeen Village Plan.

To establish copyright infringement, a plaintiff must show: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original." See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 490 U.S. 340, 361 (1991); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999). Defendants do not dispute that Plaintiffs are the owners of the Knollwood Plan, VAu 356-238. Defendants claim that they have not copied the Knollwood Plan at issue and that Plaintiffs cannot show substantial similarity. Evidence of direct copying is rare so a plaintiff may establish access by inference. *Ellis*, 177 F.3d at 506. The Sixth Circuit has noted that access merely means an opportunity to have viewed the protected material, such as viewing the actual building and promotional brochures, *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274, 277 n. 2 (6th Cir. 1988).

Because the Aberdeen Village Plans are derivative works of the Knollwood Plans, as acknowledged by both parties, the same analysis the Court used in its October 10, 2003 opinion applies to the Knollwood Plans. As this Court noted previously,

> Defendant Glieberman, through his organization, Crosswinds, is in the business of developing real estate, including condominiums and single family homes, which directly competes with Plaintiffs' real estate business. (Glieberman Dep., pp. 4-6) Defendant Glieberman testified at his deposition that developers continuously survey products being marketed by their competitors, (Glieberman Dep,, pp. 18-21, 54-56, 59) Plaintiffs have regularly advertised the Aberdeen condominiums as well as other condominium developments derived from the Aberdeen condominiums. (Moceri Aff., ¶¶ 20 and 59) Plaintiffs have filed the Aberdeen Village plans with Shelby Township. (Moceri Aff., ¶ 63) Defendant Glieberman and his employees visited the Aberdeen projects during the 1990s. (Glieberman Dep., pp. 18-21) Crosswinds' files contain various market studies including the Aberdeen's market appeal. (Glieberman Dep., p. 23) Crosswinds' files also contained an Aberdeen brochure. (Glieberman Dep., p. 23; Glieberman Ex 2) Susan Rothstein O'Neill, the project manager for the Heritage project, testified that the Aberdeen brochure had been discussed within Crosswinds well before the Heritage project began. (O'Neill Dep., pp. 50-51)
>
> Plaintiffs have offered sufficient evidence to show that the Charter Oak Homes Defendants had access to the Aberdeen plans to preclude summary judgment based on lack of access.

(October 10, 2003 Memorandum Opinion and Order, pp. 5-7) Although Mr, Merz's recent deposition states that the actual Knollwood and Aberdeen Plans were not "literally" copied or

reproduced, Mr. Merz testified that [i]t is my position not that an individual sheet *was* or was not copied but that a design was copied . . ." (Merz Dep., p. 70) Mr. Merz testified that he was not looking at whether there was a "direct copy" of the Plans but he was looking at the design. (Merz Dep., p. 70) As the Sixth Circuit held recently in *Murray Hill*, "[d]uplication or near identity is not necessary to establish infringement." *Murray Hill*, 361 F.3d at 322.

In copyright infringement cases, "granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly," but "a court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity." *Wickham v, Knoxville Int'1. Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984). The Sixth Circuit has established a two-step approach to determine substantial similarity: 1) identify which aspects of the artist's work, if any, are protectible by copyright; and, 2) determine whether the allegedly infringing work is substantially similar to protectible elements of the artist's work based on the judgment of an ordinary reasonable observer. *Kohus*, 328 F.3d at 855-56.

Defendants, in their motion, conclusorily indicate that the works are not substantially similar. However, as noted by the recent *Murray Hill* case, duplication or near identity is not necessary to establish infringement, that the combination of many different elements may command copyright protection because of its particular subjective quality, and that random similarities scattered throughout the works can be discounted. *Murray Hill*, 361 F.3d at 320. In *Murray Hill*, the Sixth Circuit noted that a scattershot approach cannot support a finding of substantial similarity because the issue is whether a lay observer would consider the works as a whole substantially similar to one another. *Id.* at 320. The Sixth Circuit further noted that granting summary judgment is a practice to

be used sparingly in copyright infringement cases. *Id. at* 321. The jury serves as a proxy for the works' intended audience and, in this role, jurors decide not only what happened, but also can be properly influenced by whether their exposure to the alleged infringing work would diminish their appetite for the copyrighted work. *Id.*

For the same reasons set forth in the Court's October 10, 2003 opinion, as to the first step, Plaintiffs' expert, Mr. Merz, opined that a unique aspect of the Aberdeen/Knollwood condominiums is their architectural features, particularly the way that both the front and back of the buildings are architecturally identical and that the spatial arrangements for the Heritage projects are identical to the spatial arrangements for Aberdeen. (Merz Aff., ¶¶ 10, 12) There are genuine issues of material fact to preclude summary judgment that the Aberdeen/Knollwood Plans and Heritage Plans are substantially similar. Defendants' Motion for Summary Judgment of Non-Infringement of the Knollwood Copyrighted Plans VAU 356-238 is denied.

5. Defendants' Motion for Summary Judgment of Invalidity of Copyright Registration No. VAu356-237 and Directing U.S. Copyright Office to Cancel that Registration

The parties agree that Copyright Registration No. VAu 356-237 is not valid. The parties signed a Stipulated Order to this effect in another case, Case No. 01-72015. Defendants argue that the U.S. Copyright Office requires an Order directing it to cancel the registration. Plaintiffs, in response, argue that an order directing the U.S. Copyright Office to cancel the registration in light of the prior Order. However, Defendants claim that Plaintiffs continue to assert Registration No. VAu 356-237 in the present case, as noted in the First Amended Complaint filed October 15, 2001 and the more recent case, 03-74600. The 2001 Stipulated Order did not direct the Registrar of Copyrights to cancel the registration. Although Plain-

tiffs sent a letter to the Registrar on April 20, 2004, Defendants claim this letter is insufficient since the Registrar did not act upon Plaintiffs' request.

Although Plaintiffs have acknowledged the invalidity of VAu 356-237, they continue to assert actions involving this register. Because Plaintiffs continue to assert the VAu 356-237 registration in this action and in the newer action, it appears that an order directing the Copyright Office to cancel the registration is required. Defendants' motion is granted.

6. Plaintiffs' Motion for Leave to File Motion for Summary Judgment

The summary judgment cutoff in this case was April 1, 2004. Plaintiffs claim that on that date Defendants filed several summary judgment motions, therefore, Plaintiffs' Motion for Summary Judgment Dismissing Defendants' Affirmative Defense that Construction of the Knollwood Building Turned the Building Design Over to the Public Domain, filed April 27, 2004, should be considered.

In response, Defendants oppose Plaintiffs motion because Plaintiffs waited 26 days after the deadline to file the motion. Plaintiffs' only excuse is that on April 1, 2004, Defendants filed several summary judgment motions. Defendants claim that Plaintiffs' underlying summary judgment motion is really an opposition brief. Defendants have not filed a response to the underlying motion since the Court has not ruled on the Motion for Leave to File Motion for Summary Judgment.

As Defendants noted, the Plaintiffs' Motion for Summary Judgment could be considered as an opposition brief. The Court considers it as such. Plaintiffs' Motion for Leave to File Summary Judgment Motion is denied. The Court considers the underlying motion as a brief in opposition to Defendants' summary judgrnent motion, in particular, Defendants' Motion for Summary Judgment on the Knollwood Plan and that it must be filtered out.

C. Motion in Case No. 03-74600: Defendants' Motion for Summary Judgment based on Equitable Defense of Laches

Count I of this Complaint alleges copyright infringement against Crosswinds Communities, Inc. Counts II and III apply only to Defendant Glieberman and allege vicarious and contributory liability for Crosswinds' alleged copyright infringement. Defendants move for summary judgment on all counts based upon the defense of laches.

Defendants claim that Plaintiffs knew about the Jonathan's Landing development, the accused infringer project in this case, as early as May 9, 2002. Plaintiffs so admit in their interrogatory answers. Over 18 months later, on November 14, 2003, Plaintiffs filed the instant lawsuit, after the units were substantially completed. Defendants claim they are prejudiced because Plaintiffs waited for the building at Jonathan's Landing to be substantially completed even though they knew about the project prior to the building being built.

Jonathan's Landing is projected to contain 252 units. As of March 31, 2004, there were 192 units that were either under construction and/or had been completed. At the time the Complaint was filed on November 14, 2003, there were 168 units; 109 units were occupied and 141 units were sold. In *Chirco v. Hampton Ridge, LLC*, No. 01-72015 (E.D. Mich.), Plaintiffs deposed George Attard, Jr. on May 9, 2002. Mr. Attard was one of the architects who created the plans for the Jonathan's Landing development. At the deposition, Plaintiffs' counsel asked about Jonathan's Landing, a project not raised by Mr. Attard. (Attard Dep., pp. 85-87) Defendants claim there is further indication that Plaintiffs knew about Jonathan's Landing well before the deposition. For example, the plans for Jonathan's Landing were filed with the city on December 7, 2001. Plaintiffs also responded in their interrogatory that they had one copy of the Jonathan's Landing plans. Defendants have outstanding discovery on this issue. In

any event, Defendants claim that as early as May 9, 2002, Plaintiffs knew of Jonathan's Landing, therefore, Plaintiffs' suit is barred by the doctrine of laches.

In response, Plaintiffs argue that Defendants' development of Jonathan's Landing constitutes unclean hands and as a matter of equity, laches cannot apply. Plaintiffs cite no facts to support the unclean hands claim. Plaintiffs also argue that the statute of limitations precludes a laches defense. Plaintiffs cite no law to support their position. Plaintiffs further argue that their claim in Case No. 01-71403 covers the Jonathan's Landing case in Case No. 03-74600.

"Laches is not . . . a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced." *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003). In the copyright context, the test for determining the equitable defense of laches requires that "plaintiff did not assert its rights diligently and that this lack of diligence was prejudicial to the defendants." *Broadcast Music, Inc. v. Peppermint Club, Inc.*, 229 U.S.P.Q. 534, 536 (M.D. Oh. 1985). A party's notice or lack of notice that its rights are being infringed is particularly relevant to determining whether that party lacked diligence in protecting its rights. *Ford Motor*, 342 F.3d at 550. In *King v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1038-39 (9th Cir. 2000), the Ninth Circuit held "that while the statute of limitations is triggered only by violations—i.e., actual infringements—the laches period may be triggered when a Plaintiff knows or has reason to know about an impending infringement."

Defendants have shown prejudice in this case. As of the filing of the Complaint, more than 168 units were built, 109 of which were occupied. Plaintiffs have not shown why they did not diligently pursue the claim as to Jonathan's Landing *as* early as May 9, 2002, or perhaps earlier. Plaintiffs have not shown that the Jonathan's Landing case was in fact covered in Case No. 01-71403, a case in which Crosswinds is not a

party. There is no mention of the Jonathan's Landing project in the Amended Complaint. Defendants had no notice that Plaintiffs were going to sue them regarding this project.

Defendants' Motion for Summary Judgment Based upon the Equitable Defense of Laches is granted and the case dismissed against both Defendants, Based on this ruling, the Court assumes Defendants will not pursue their Counterclaim against Plaintiffs. The Court dismisses the Counterclaim without prejudice.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Plaintiffs' Motion to Strike Defendants' Motion for Summary Judgment based on *Dastar* (Case No. 01-CV-71403-DT, Docket No. 151, filed 3/26/04) is GRANTED;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment based on *Dastar* (Case No. 01-CV-71403-DT, Docket No. 147, filed 3/5/04) is DENIED;

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment re Knollwood Building and Filtering Out (Case No. 01-CV-71403-DT, Not on the Docket) is DENIED;

IT IS FURTHER ORDERED that Defendants' Motion for Partial Summary Judgment re Count I based on reproducing and distribution (Case No. 01-CV-71403-DT, Docket No. 150, filed 4/1/04) is GRANTED IN PART and DENIED IN PART as more fully set forth above;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment re the Knollwood Copyright VAu356-238 (Case No. 01-CV-71403-DT, Docket No. 149, filed 4/1/04) is DENIED;

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment of Invalidity of No. VAu356-237 and for an Order Directing U.S. Copyright Office to Cancel Registration of No. VAu356-237 (Case No. 01-CV-71403-DT, Docket No. 154, filed 4/1/04) is GRANTED;

IT IS FURTHER ORDERED that the United States Copyright Office cancel Registration No. VAu356-237, by reason of the architectural works, i.e., the design of the building, having been embodied in multiple buildings constructed before enactment of the Architectural Works Copyright Protection Act;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Motion for Summary Judgment (Case No. 01-CV-71403-DT, Docket No. 158, filed 4/28/04) and Plaintiffs' Motion for Summary Judgment are DENIED, considered by the Court as a brief in opposition;

IT IS FURTHER ORDERED that in Case No. 01-CV-71403-DT, a Status Conference is scheduled for Monday, May 16, 2005, 3:15 p.m.;

IT FURTHER 1S ORDERED that Defendants' Motion for Summary Judgment based on laches (Case No. 03-CV-74600-DT, Docket No, 7, filed 4/1/04) is GRANTED;

IT IS FURTHER ORDERED that Defendants' Motion to Extend Time to Answer Motion for Summary Judgment dismissing Defendants' Affirmative Defenses (Case No. 03-CV-74600-DT, Docket No, 11, filed 5/19/04) is GRANTED; and

IT TS FURTHER ORDERED that the Complaint in Case No. 03-CV-74600-DT is DISMISSED with prejudice and that the Counterclaim is DISMISSED without prejudice.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

Dated: March 31, 2005

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed MAR 31, 2005]

Case No: 03-CV-74600-DT
Honorable Denise Page Hood

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiffs,

v.

CROSSWINDS COMMUNITIES, INC., *et al.*,
Defendants.

MARCH 31, 2005 FILED
MARCH 31, 2005 DECIDED

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date (Sec Dockets in Case Nos. 01-CV-71403-DT and 03-CV-74600-DT) and the Court having entered an order granting Defendants' Motion for Summary Judgment and dismissing Plaintiffs' Complaint with prejudice;

Accordingly, judgment is entered in favor of Defendants and against Plaintiffs.

DAVID J. WEAVER
CLERK OF COURT

By: /s/ William F. Lewis
WILLIAM F. LEWIS
Deputy Clerk

Approved:

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

Dated: March 31, 2005

Detroit, Michigan

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-1715

MICHAEL A. CHIRCO; DOMINIC J. MOCERI,
Plaintiffs-Appellants,

v.

CROSSWINDS COMMUNITIES, INC.,
and BERNARD GLIEBERMAN,
Defendants-Appellees.

Argued: June 6, 2006
Decided and Filed: January 10. 2007

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 03-74600—Denise Page Hood, District Judge.

Before: DAUGHTREY and COLE, *Circuit Judges*; GRAHAM, *District Judge*.*

OPINION

MARTHA CRAIG DAUGHTREY, *Circuit Judge*. The plaintiffs, Michael Chirco and Dominic Moceri, are Detroit-area real estate developers who brought suit against Crosswinds Communities and its principal shareholder, Bernard Glieberman, alleging that the defendants had copied the

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* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

plaintiffs' architectural design for a "twelve-plex" condominium building, which was protected by copyright and to which they had exclusive rights of construction. The district court granted summary judgment to the defendants, finding that they had been prejudiced by unnecessary delay between the time the plaintiffs had learned that construction was planned (or, alternatively, the time that construction was undertaken) and the time that the complaint was filed, even though the action was filed within the three-year statute of limitations provided by the Copyright Act in 17 U.S.C. § 507(b). On appeal, the dispositive question is whether the equitable doctrine of laches can be held to trump the statutorily-prescribed period for filing suit under § 507(b). To the extent that the plaintiffs in this case are seeking only monetary damages and injunctive relief, we give effect to the Sixth Circuit's presumption that the statute of limitations must prevail. However, to the extent that the relief sought is destruction of the condominium complex that allegedly infringes the plaintiffs' copyright, the facts before us suggest that this is indeed the extraordinary case in which the defense of laches is properly interposed. We thus remand the case to the district court for clarification of the nature of the relief sought in this action and for such further proceedings as are appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

Working with an architectural firm, the plaintiffs designed plans for residential developments that sought to maximize space utilization and aesthetic appeal. According to statements made by Moceri in an affidavit:

> 14. [The plans that were developed] describe a unique twelve unit residential building. The fronts and backs are identical in appearance, so there is no "back" of the building. There are four units on the first floor as well as a row of six single car garages on the first floor at each end of the building. There are eight units on the second

floor, of which 4 are over garages. Each of the four second floor units which are constructed over a garage are placed on three garages, which allows the building to be built as four distinct quadrangles with fire rated walls separating each quadrangle. Each of the twelve garages has direct access to its assigned residential unit without requiring the occupants to go outside or use a common hallway to access their units.

15. One of the unique aspects of the [plans] is the way that it can occupy a site. Because the garages are on the side of the building and because the garages of adjoining buildings face each other, the driveway orientation is quite compact, which allows the buildings to be spaced just 64 feet from each other. This allows relatively high density of the units, and an efficiency of infrastructure design and implementation, thus allowing significant cost savings for this work.

16. Because of the unique utilization of space and its architectural design, the . . . condominiums can be built with high density but with tremendous appeal to governmental authorities, customers, and neighboring property owners.

The plaintiffs obtained copyrights on November 28, 1997, for the architectural plans for two developments known as Knollwood Manor and Aberdeen Village, as well as for the constructed buildings at those developments. Chirco and Moceri allege that, on December 31, 2000, Glieberman, as an officer and agent of Charter Oak Homes and American Heritage Homes, began building the Heritage Condominium development in Waterford Township, Michigan, according to plans based directly upon or copied from the copyrighted plans and architectural works for Knollwood Manor and Aberdeen Village. Only three months later, on April 1, 2001, the plaintiffs filed suit against Glieberman, Charter Oak Homes, and American Heritage Homes in federal district

court, alleging copyright infringement and seeking injunctive and monetary relief.

During the discovery period for that federal law suit, *Chirco v. Charter Oak Homes, Inc.* (No. 01-71403), the plaintiffs obviously learned of Glieberman's intention to build yet another development that allegedly infringed upon the plaintiffs' copyrights, because plans for a Glieberman project known as Jonathan's Landing in Howell, Michigan, were found in the plaintiffs' files, dating from April 16, 2001. Six months later, on October 16, 2001, the plaintiffs made a request of local officials for copies of the plans for the Jonathan's Landing project through the Michigan Freedom of Information Act. Those plans were then sent to the plaintiffs a week later, but no action was taken by Chirco and Moceri, even in May 2002, when Glieberman and Crosswinds Communities, Inc., broke ground for the 252-unit development. In fact, the plaintiffs took no steps to prevent the second alleged infringement of their copyrights until November 14, 2003, when the plaintiffs filed a second federal law suit against Glieberman, *Chirco v. Crosswinds Communities, Inc.* (No. 03-74600). By that time, 168 of the planned 252 units had been constructed, 141 of them sold, and 109 already occupied by the buyers.

Eventually, the defendants filed a motion for summary judgment in the second law suit, *Chirco v. Crosswinds Communities, Inc.*, arguing that the plaintiffs' attempts to recover for copyright infringement were barred by the equitable doctrine of laches. The district judge agreed, ruling that the plaintiffs knew of the Jonathan's Landing construction for at least 18 months prior to the filing of the federal action. The district court further stated:

> Defendants have shown prejudice in this case. As of the filing of the Complaint, more than 168 units were built, 109 of which were occupied. Plaintiffs have not shown why they did not diligently pursue the claim as to

> Jonathan's Landing as early as May 9, 2002, or perhaps earlier. Plaintiffs have not shown that the Jonathan's Landing case was in fact covered in Case No. 01-71403, a case in which Crosswinds is not a party. There is no mention of the Jonathan's Landing project in the Amended Complaint. Defendants had no notice that Plaintiffs were going to sue them regarding this project.

Consequently, the district judge granted the defendants' summary judgment motion and dismissed case 03-74600 with prejudice. The plaintiffs now appeal that ruling.

DISCUSSION

Ordinarily, an appellate panel reviews "a district court's resolution of a laches question for an abuse of discretion." *City of Wyandotte v. Consol. Rail Corp.*, 262 F.3d 581, 589 (6th Cir. 2001). However, when a reviewing court is presented with a threshold question of law as to whether the laches doctrine is even applicable in a particular situation, as we are here, our review is *de novo. See, e.g., Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 623 (6th Cir. 2003).

In this circuit, laches is understood to be "a negligent and unintentional failure to protect one's rights." *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001). Thus:

> [L]aches does not result from a mere lapse of time but from the fact that, during the lapse of time, changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is now to be enforced. By his negligent delay, the plaintiff may have misled the defendant or others into acting on the assumption that the plaintiff has abandoned his claim, or that he ac-

> quiesces in the situation, or changed circumstances may make it more difficult to defend against the claim.

11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2946 at 117 (2d ed. 1995) (quoting de Funiak, *Handbook of Modern Equity* § 24 at 41 (2d ed. 1956)).

The plaintiffs insist that laches is not available as an affirmative defense in this case, however, because the Copyright Act itself references a specific period during which actions under the statute may be brought, and because Chirco and Moceri filed their complaint within that time frame. Indeed, 17 U.S.C. § 507(b) provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." Because the plaintiffs filed their complaint regarding the Jonathan's Landing project on November 14, 2003, the statutory limitations period would ordinarily allow the federal courts to examine any claim that accrued on or after November 14, 2000, at least five months before the defendants' development plans were found in the plaintiffs' possession, and 18 months before the actual initiation of construction activities.

The rationales underlying the plaintiffs' position on the application of the laches doctrine in a copyright case have been summarized by the Fourth Circuit in its decision in *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001):

> First, laches is a doctrine that applies only in equity to bar equitable actions, not at law to bar legal actions. Second, we note that, in any event, in connection with the copyright claims, separation of powers principles dictate that an equitable timeliness rule adopted by

> courts cannot bar claims that are brought within the legislatively prescribed statute of limitations.

Thus, ruled the court, "when considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature' s judgment as to the appropriate time limit to apply for actions brought under the statute." *Id.* at 798.

Other courts have likewise openly questioned the legality of supplanting statutory limitations periods in various contexts. For example, in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946), the United States Supreme Court, reviewing an action brought pursuant to § 16 of the Federal Farm Loan Act, 12 U.S.C. § 812, stated in dicta, "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *See also United States v. Mack*, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations [set forth in the National Prohibition Act] is no defense at law.").

The United States Court of Appeals for the Tenth Circuit has noted in a *criminal* proceeding that "[b]ecause laches is a judicially created equitable doctrine, whereas statutes of limitations are legislative enactments, it has been observed that in deference to the doctrine of separation ofpowers, the Supreme Court has been circumspect in adopting principles of equity in the context of enforcing federal statutes." *United States v. Rodriguez Aguirre*, 264 F.3d 1195, 1207-08 (10th Cir. 2001) (quotation marks, citations, and alterations omitted). In a *civil* context, the Tenth Circuit has also ruled that "[r]ather than deciding cases on the issue of laches, courts should *generally* defer to the three-year statute of limitations, 17 U.S.C. § 507(b), provided by the Copyright Act." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 950 (10th Cir. 2002) (emphasis added).

The *Jacobsen* court did recognize, however, that under different circumstances, "a court can apply laches in a copyright case." *Id.* at 951 (citing *Jackson v. Axton*, 25 F.3d 884, 888 (9th Cir. 1994), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 531-32, 534 (1994)). Indeed, the Ninth Circuit later engaged in the analysis of a laches defense in another copyright infringement case, *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036-42 (9th Cir. 2000), despite the Copyright Act's inclusion of its own statute of limitations on causes of action. The following year, the Ninth Circuit again discussed the laches defense to a copyright infringement case, citing for justification Learned Hand's ruling in *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D. N.Y. 1916):

> It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot possibly lose, and he may win.

Danjaq LLC v. Sony Corp., 263 F.3d 942, 951 (9th Cir. 2001).

The Sixth Circuit has carved out a middle ground between the Fourth Circuit's strict prohibition on application of the laches doctrine in cases involving a statute with an explicit limitations provision and the somewhat more expansive application of the doctrine by the Ninth Circuit. We have, for example, recognized that:

> Several reasons underlie the use of the statutory period as the laches period. It enhances the stability and clarity of the law by applying neutral rules and principles in an

> evenhanded fashion rather than making the question purely discretionary. It also requires courts to make clear distinctions between threshold or special defenses or pleas in bar and the merits of the case. It enhances the rationality and objectivity of the process by preventing courts from short circuiting difficult issues on the merits by confusing or conflating the merits of an action with other defenses.

Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 365 (6th Cir. 1985). Indeed, in numerous decisions, not involving claims made pursuant to the Copyright Act, we have affirmed the rule that if the "statute of limitation has not elapsed, there is a strong presumption that plaintiffs delay in bringing the suit for monetary relief is reasonable. Only rarely should laches bar a case before the . . . statute has run." *Id.* at 366 (presumptive effect should have been given to three-year statute of limitations applicable to trademark infringement action brought pursuant to the Lanham Act, which does not contain its own limitations period). *See also Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003) (presumption that trademark infringement action is alive if brought within analogous statute of limitations period); *Herman Miller*, 270 F.3d at 321 (same as *Tandy Corp.*); *Patton v. Bearden*, 8 F.3d 343, 348 (6th Cir. 1993) ("strong presumption that laches will not apply when the analogous state statute of limitations in contract action has not run, absent compelling reason"); *Elvis Presley Enters.*, 936 F.2d at 894 (strong presumption in trademark infringement case that delay within statute of limitations period is reasonable absent "compelling reasons").

We have not, however, ruled out invocation of the equitable doctrine when an applicable statute otherwise references an explicit limitations period. Although we have sought to restrict such use to the most compelling of cases, we have explicitly recognized that the doctrine of laches *can* be

applied in copyright infringement cases. In *Hoste v. Radio Corporation of America*, 654 F.2d 11, 12 (6th Cir. 1981), for example, even when we reversed a district court ruling that barred recovery for the plaintiff by application of laches within the statute of limitations period, we did not rule that the laches doctrine was *always* inapplicable in such a situation. Rather, the panel simply noted that "[t]he defendants filed no affidavits in support of their motion for summary judgment. Thus there was no evidence of prejudice to them by reason of the plaintiffs delay in filing this action." *Id.* The court therefore remanded the matter for further development of the salient issues. Additionally, in *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 783 n.13 (6th Cir.), *cert. denied*, 126 S.Ct. 374 (2005), we noted, "Although circuits are split as to whether laches is available as a defense under the Copyright Act, laches is available as an affirmative defense in a copyright action in the Sixth Circuit." (Citations omitted.)

The plaintiffs urge us to reject that proposition, arguing that in *Broadcast Music*, the statement is mere dicta. Perhaps so, but in this instance, it constitutes dicta that is fated to be followed. As has the Seventh Circuit, we conclude that a flat proscription such as that invoked by the Fourth Circuit against the defense of laches in cases involving a federal statutory claim is both unnecessary and unwise. The Seventh Circuit, presented with a claim pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, reasoned that "just as various tolling doctrines can be used to lengthen the period for suit specified in a statute of limitations, so laches can be used to contract it." *Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002). Indeed, laches can be argued "regardless of whether the suit is at law or in equity, because, as with many equitable defenses, the defense of laches is equally available in suits at law." *Id.* We have little

hesitation in adopting the Seventh Circuit's philosophy as the sounder approach.

Because the equitable doctrine of laches can, therefore, be applied in copyright cases in this circuit in what can best be described as unusual circumstances, our first task in this case is to determine whether the plaintiffs were less than diligent in pursuing their copyright infringement claim against Crosswinds Communities, Inc., and Bernard Glieberman. If we conclude that an inordinate delay in fact occurred, we must then decide whether the failure of the plaintiffs to file suit in a timely manner resulted in *undue* prejudice to the alleged infringers.

The parties do not dispute that the statute of limitations for a copyright infringement action is three years and that the plaintiffs' filing of Case No. 03-74600 on November 14, 2003, would ordinarily permit the plaintiffs to recover for any infringements that could be proven to have occurred after November 14, 2000. The parties also agree that the plaintiffs foled a copyright infringement action against Charter Oak Homes, American Heritage Homes, and Bernard Glieberman in another matter—Case No. 01-71403—on April 1, 2001, three months after the defendants began work on their Heritage Condominium project in Waterford Township, Michigan. Only two weeks after the filing of that first law suit, *plans* for the Jonathan's Landing development by defendants Crosswinds Communities, Inc., and Bernard Glieberman in Howell, Michigan, were known to be in the plaintiffs' files. Nevertheless, the plaintiffs made no effort to amend their complaint in Case No. 01-71403 to reference specifically the new, allegedly infringing development ideas. Approximately six months later, on October 22, 2001, the plaintiffs received copies of the actual plans filed by the defendants with local officials for the Jonathan's Landing project. Still, no action was taken by Chirco and Mocerri to enjoin that new project because, according to the plaintiffs, they believed that any

injunction issued in the Waterford Township suit would also cover the Jonathan's Landing development and because no actual infringement of the plaintiffs' copyrights had yet occurred.

In May 2002, defendants Crosswinds Communities and Glieberman broke ground on the Jonathan's Landing development, dispelling any doubt that the defendants intended to proceed with the project and indicating clearly that the defendants did not believe the new development was covered by the initial suit filed to enjoin the Waterford Township construction. Even so, the plaintiffs gave no indication that they were being harmed by the project. Furthermore, the record on appeal is clear that Chirco and Moceri were aware of the activities at Jonathan's Landing. First, all the developments being marketed by the plaintiffs and by the defendants were located in the general vicinity of Detroit; consequently, arduous and expensive travel would not have been necessary to observe the activities that were being undertaken. Second, on May 9, 2002, the plaintiffs indicated their knowledge of the Jonathan's Landing/Howell, Michigan, project and its progress by posing questions about that development at a deposition connected with the initial law suit concerning the Waterford Township development.

Still, for 18 more months, Chirco and Moceri took no overt steps to halt the defendants' construction project in Howell. Only on November 14, 2003, did the plaintiffs finally file suit against Crosswinds Communities, Inc., and Glieberman, presumably in an effort to protect "zealously" the rights they claimed to have been granted by statute. Despite the fact that the plaintiffs filed suit over an alleged infringement concerning *the Waterford Township project* only three months after commencement of construction activities, they argue now that the 18-month hiatus between groundbreaking at Jonathan's Landing and the initiation of this suit is still well within the

copyright statute's three-year limitations period and should not, therefore, restrict their ability to seek relief under the provisions of the Copyright Act.

To the extent that the plaintiffs seek only the monetary damages and injunctive relief allowed by the Copyright Act for violations of the statute's provisions, *see* 17 U.S.C. § 502 (allowing injunctive relief to prevent or restrain infringement of a copyright); § 503 (permitting destruction or disposition of all copies made or used in violation of a copyright owner's rights); § 504 (providing for actual damages and profits or statutory damages for copyright infringement); § 505 (recognizing the right to recover costs and attorney's fees), we cannot conclude that the defendants were *unduly* prejudiced by the plaintiffs' delay in filing this cause of action. Even though we might well debate the wisdom of a three-year statute-of-limitations period that would permit the extensive construction that occurred in this case before the filing of a complaint, the resolution of that debate, under our tripartite system of government, is committed to the discretion of the legislature.

To the extent, however, that the relief sought by the plaintiffs exceeds what might otherwise be considered just, we recognize that a statutory limitation period on filing suit need not always trump equitable principles. *See, e.g., Jacobsen*, 287 F.3d at 950 ("courts should *generally* defer to the three-year statute of limitations . . . provided by the Copyright Act") (emphasis added); *Rodriguez-Aguirre*, 264 F.3d at 1208 ("it is possible, *in rare cases*, that a statute of limitations can be cut short by the doctrine of laches") (emphasis added); *Elvis Presley Enters.*, 936 F.2d at 894 (defendant "must articulate '*compelling reasons*' in support of his laches claim") (emphasis added); *Tandy Corp.*, 769 F.2d at 365 ("*in the absence of unusual circumstances*, a suit will not be barred before the analogous statute has run") (emphasis added). In this matter, despite the plaintiffs' knowledge of the

defendants' plans and intentions, Chirco and Moceri deliberately delayed as those plans were submitted to local officials as part of the permitting process, as ground was broken on the project, as advertisements about the development were disseminated, as construction on Jonathan's Landing began, as 168 of the planned units were completed, as the defendants sold 141 of those condominiums, and as 109 individuals or families actually occupied what they hoped to make their homes. Only at that point, more than two-and-one-half years after having plans for Jonathan's Landings in their files, did the plaintiffs see fit to file their copyright infringement suit, requesting not only money damages and an injunction against future infringement, but also the destruction of "all architectural works which have been built using plans which infringe the Copyrighted Materials." Such a request smacks of the inequity against which Judge Hand cautioned in *Haas* and which the judicial system should abhor. We thus affirm the district court's determination that the plaintiffs' inordinately lengthy delay in filing this suit makes any effort to procure the destruction of buildings already occupied, sold, or substantially constructed unduly prejudicial to the defendants.

CONCLUSION

In most cases, efforts by a plaintiff to obtain the monetary or injunctive relief authorized by statute within the limitations period provided by the Copyright Act will be allowed to proceed. In those unusual cases, however, when the relief sought will work an *unjust* hardship upon the defendants or upon innocent third parties, the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand. We have thus previously indicated that the equitable doctrine of laches may be raised as a defense in some copyright infringement suits brought within this circuit, and we reemphasize that point today. Because the defendants have established, with uncontoverted facts, that the plaintiffs knew of

the defendants' challenged construction plans and activities and yet failed to take readily-available actions to abate the alleged harm, and because the defendants and innocent third parties have been unduly prejudiced by that inaction, we AFFIRM the judgment of the district court insofar as it dismisses the plaintiffs' efforts to mandate the destruction of the Jonathan's Landing project. In all other respects, we REVERSE the judgment below and REMAND this matter to the district court for such further proceedings as may be appropriate in light of this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 01-71403 & 03-74600

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiff,

v.

CHARTER OAK HOMES, INC., AMERICAN HERITAGE HOMES, L.L.C., BERNARD GLIEBERMAN, CROSSWINDS COMMUNITY, INC. and PROGRESSIVE ASSOCIATES, INC.,
Defendants.

MOTION HEARING

Before The Honorable Denise Page Hood
United States District Judge
237 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
Wednesday, July 21, 2004

APPEARANCES:

STEPHEN F. WASINGER.
Wasinger, Kickham & Hanley
26862 Woodward Avenue
100 Beacon Centre
Royal Oak, Michigan 48067
(248) 414-9942
On Behalf of Plaintiff.

JULIE A. GREENBERG
Gifford, Krass, Gorh, Sprinkle, Anderson & Citkowski, P.C.
280 North Old Woodward Avenue
Suite 400
Birmingham, Michigan 48009
(248) 647-6000

On behalf of Plaintiff.

GEORGE M. DEGROOD, III
Thomas, DeGrood, Wittenoff & Hoffman, P.C.
400 Galleria Officentre
Suite 550
Southfield, Michigan 48034
(248) 353-4450

On behalf of Defendant Progressive Associates.

DOUGLAS P. LALONE
Warn, Hoffmann, Miller & LaLone, P.C.
691 North Squirrel Road
Suite 140
Auburn Hills Michigan 48326

On behalf of Defendant Charter Oak Hanes, American Heritage Hanes, Bernard Gileberman and Crosswinds Community.

BERNARD J. CANTOR
Harness, Dickey & Pierce, P.L.C.
5445 Corporate Drive
Suite 400
Troy, Michigan 48098
(248) 641-1600

On behalf of Defendants Charter Oak Homes, American Heritage Homes, Bernard Glieberman.

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EXHIBITS

Exhibit No.	Offered	Received

(None offered)

Detroit, Michigan
July 21, 2004
4:06 p.m.

* * * *

[4] THE COURT: I have your file in the back but it's okay, we can start, don't you think? This is 01-671403, Chirco versus Charter Oak. It's four motions for summary judgment, two motions for partial summary judgment and a motion to strike.

MR. WASINGER: Your Honor, may I ask a point of clarification, please? There are two numbers, as your Honor knows in this case. There's also the 03-74600 and when you had the scheduling order in April, which is docket—docket 144, you put them both on the same number and one of these motions—the reason I'm asking, one of the motions on the laches is filed on the 03-74600 case.

So your Honor may recall we originally had this whole thing done with Charter Oaks and then we—so I just think maybe it would be appropriate to refer to both case numbers.

THE COURT: Okay. All right. Then 03-74630 (sic). Do you want to do that one first?

MR. CANTOR: I'm sorry, your Honor, I did not hear you.

[5] THE COURT: I just called the case number of 03-74630 (sic) as well for the motion involving the laches argument.

Miss Malayang, this is on my desk.

MR. CANTOR: All right. I'd like to start, I think it would fit in nicely with the first motion which is the Charter Oak's motion to filter out the design of the Knollwood building. That's docket number 149.

THE COURT: Okay. Do you have any objection to that?

MR. WASINGER: No, Your Honor, whatever your preference is is fine with me.

THE COURT: I don't have a preference this afternoon. You may begin there. Put your appearances on first though.

MR. CANTOR: Yes, my name is Bernard Cantor. I'm with the firm of Harness, Dickey & Pierce, and I represent Defendants Charter Oak Homes, American Heritage Homes, Bernard Glieberman and Progressive Associates—I'm sorry, Progressive Associates' attorney is here, not too far. Do you want to introduce yourself?

THE COURT: Okay. They're going to introduce themselves.

[6] MR. LaLONE: Good afternoon, your Honor, Doug LaLone. I'm here on behalf of Charter Oaks American Heritage, Bernard Glieberman in case number 01-71403, and then in the second case here representing Defendant Bernard Glieberman and also Crosswinds.

MR. DeGROOD: Good afternoon, your Honor, may it please the Court, George DeGrood, on behalf of Progressive Associates, Incorporated.

MR. WASINGER: Your Honor, my name is—

THE COURT: Wait a minute, I don't have everybody at that table.

MR. WASINGER: Oh, I'm sorry.

MR. LaLONE: With me also, your Honor, is Patty Gorton.

THE COURT: Patty?

MR. LaLONE: Patty Gorton, G-o-r-t-o-n, with Crosswinds.

MR. WASINGER: She's not a lawyer, your Honor, she's a claims representative.

THE COURT: Oh, she's a claim representative?

MR. LaLONE: Correct.

THE COURT: Okay. Very well. And for the Plaintiff?

[7] MR. WASINGER: Your Honor, my name is Steve Wasinger. I'm here on behalf of both of the Plaintiffs with my co-counsel, Julie Greenberg, who can speak for herself but I was going to try to speed up the process.

THE COURT: Okay. Very good. I'm ready for you to proceed.

MR. CANTOR: Thank you, Your Honor. The motion before the Court at the moment is Defendant's motion for summary judgment that the design of the Knollwood building is not protected by copyright law and must be filtered out. That motion bears the docket number of 149.

THE COURT: Okay.

MR. CANTOR: Your Honor, I think I can get to the heart of the motion very quickly if I can refer the Court to several charts, which have on it material that refer to so I don't have to read or discuss this material. I'm going to hand this to the Court. I appreciate the Court accepting it.

THE COURT: Okay. That's fine. These charts are available to the Plaintiffs?

MR. CANTOR: Yes.

THE COURT: You just gave them to them?

MR. LaLONE: Yes, ma'am.

[8] THE COURT: You don't have any objection to these, I assume?

MR. WASINGER: No, Your Honor.

THE COURT: Okay. Let's proceed.

MR. CANTOR: Your Honor will recall the case involves a copyright infringement claim brought by Mr. Chirco and Mr. Moceri against the Charter Oak Homes and American Heritage Homes and the rest of them. The motion itself is sharply focused on one area of the complaint and the

copyrights. That area, however, I believe will be quite significant to the rest of the case. The focus is on one section of the copyright law which was amended on December 1, 1990. The case itself is a peculiar case as copyright cases go because it covers a transition in the copyright law which occurred on December 1, 1990, at which time the law for the first time granted protection to architectural works. Before that time, architectural works were not protected by copyright.

Now, the law, which is in relevant part reproduced first in our brief, and secondly foreshortened and reproduced on this chart which I just handed the Court.

THE COURT: Okay. It begins—

MR. CANTOR: 17 U.S.C. 101 and it starts [9] with that.

THE COURT: Okay.

MR. CANTOR: Under this law—under this change in the law, the definition of an architectural work was stated to be the design of a building and then the criteria of what the law means is set forth in that chart in the first paragraph. This is a direct quote from the statute in our case. Here there were two sets of copyright registrations obtained and which are involved in this lawsuit. One set is called Knollwood and the other set is called Aberdeen Village. We're focusing on Knollwood for this motion. Knollwood had two copyrights.

One of the copyrights, which is referred to perhaps inaccurately, but nevertheless referred to as the copyright relating to the Knollwood plan. More accurately, it is a copyright registration of a plan which embodies the design of the Knollwood drawing it embodies the design of the Knollwood building, I'm sorry. The second copyright refers to the design of the Knollwood building embodied in a physical building, actually 19 physical buildings constructed with that design.

Now, in the transition in the law, in the past people could obtain a copy of the plans of a [10] building, and as long as they did not reproduce the plans, they could use the plans to make buildings. The buildings that were made from those plans were not violation —violative of the copyright law.

On December 1, 1990 that changed, and that's where this motion comes in. At that point, the law stated that the design of a building which was not published and not constructed before December 1, 1990 could now be copyrighted. If the design of the building remained unpublished and uncopyrighted for the next few years until December 31, 2002, that any copyright obtained on that unpublished, unbuilt design would be void, so it was a window of opportunity for people who designed buildings to protect their designs, provided the design was not constructed in buildings and not published in plans or whatever before December 1, 1990.

And this is a case in which in fact the Knollwood buildings embodying the Knollwood design were constructed in substantial numbers before December 1, 1990. Therefore that design in that building could not be registered as a copyright, could not be protected by copyright law.

Simultaneously, the plans themselves in one form or another, or parts of the plans, were published [11] in two ways, one by the large number of buildings that were built. One building is not considered a publication. Multiple copies of the buildings are. Secondly, the plans themselves were published in various advertisements, brochures and so forth.

So we have a situation where the design of the Knollwood building, which is called an architectural work, predated December 1, 1990, was published, was constructed and embodied in a substantial number of constructed buildings. That means that design could not be copyrighted. Other things could be but not that design and we're asking the Court to keep that in mind because the motion now asks for relief in

the form of excluding that design, of filtering out that design, of not considering that design in determining whether the Defendants' drawings or plans infringe the Knollwood plans.

And that comes about because of the decision of the Sixth Circuit Court of Appeals last year in two important cases. One was the *Kohus* case. That's *Kohus*, K-o-h-u-s, *versus Mariol*, 328 Fed. 3rd 848, which was decided last summer and was followed not too long after that in this year, year 2004, by the *Murray Hill versus 20th Century Fox* case; and even more recently, it was followed by the *Winfield* case of [12] Judge Gadola of this district court.

Those cases say that unprotected subject matter in copyrighted works must be disregarded—must be filtered out, which is the word used when comparing the copyrighted materials with the accused materials. So this Court is directed by the Sixth Circuit Court of Appeals to first of all determine what is the design that is supposed to be unprotected, and secondly, to not consider that design when comparing the Knollwood plans or the Knollwood building, too for that matter, with the accused Defendants' plans, which are referred to as Heritage—that was the name of the project, the Heritage project, and if the Court filters out or disregards the design—unprotectable design from the plans, then the Court can determine whether the remaining parts of those plans are or are not substantially similar to the Heritage plans or building, and I think that the Court will find in this case are not, and in any event, that would be before the Court.

Now, in order to explain that further, which can be done very quickly, we have to ask ourselves a question: What exactly is this design of the Knollwood building that the Court is supposed to [13] determine and filter out?

THE COURT: Okay. Mr Cantor, one second.

MR. CANTOR: I'm sorry.

THE COURT: Miss Malayang, could you come over, please.

(After a brief delay, the proceedings continued.)

THE COURT: Okay. Please proceed.

MR. CANTOR: The question that is in front of us now is what is this design of the Knollwood building that is to be filtered out if we follow the direction of the Sixth Circuit Court of Appeals?

We're helped in deciding that by the deposition testimony of the Plaintiff's expert witness, Mr. Merz. Mr. Merz qualified himself as a practicing architect, and he appeared for his deposition on March 23, 2004, at which time I asked him repeatedly just what is the design of the Knollwood building, and he repeatedly answered—consistently answered that the design of the Knollwood building is exactly what he said in his Rule 26 report. The expert witnesses of the parties submitted to the Court Rule 26 statements regarding their opinions and their findings in connection with this matter, so that means that, at least for the purpose [14] of this motion, we do not have to sit down and go through the design line by line, item by item except in general. We can say that Mr. Merz listed eight or nine things which he said were combined together and arranged together to make up the Knollwood design and he said, in effect, it's in my report.

Now, in order to avoid the possibility of anyone saying that I tricked Mr. Merz or in some way he slipped up in what he was saying or he misspoke, I asked him that question repeatedly, and. I took the answers and the questions and put it on the second chart that I handed the Court.

THE COURT: Okay. One second.

MR. CANTOR: Now, the Court will notice there are three columns on that chart.

THE COURT: This three panel one is the one you're referring me to?

MR. CANTOR: Yes, and that is a reproduction of excerpts of Mr. Merz's deposition testimony. The full transcript is attached to our motion which was submitted to the Court originally, but these are excerpts, and I asked him repeatedly to explain or define the design of the Knollwood building and he did. It's all in his report.

He also stated that he did not contend that [15] the drawings of the Plaintiffs' alleged copyright were copied or were the same as the Defendants' drawings. He said that a number of times, and I put it here a couple of times, that he was not contending that the drawings are the same. For example, he said, quote, well, I'm not contending any of the drawings were replicated.

THE COURT: Okay. Are you on his—reading on this chart?

MR. CANTOR: Pardon me?

THE COURT: Are you reading on this chart?

MR. CANTOR: Yes I just read in the right hand column about five lines down.

THE COURT: Okay. Do you know what page that is?

MR. CANTOR: I'm sorry?

THE COURT: Do you know what page of the deposition that is?

MR. CANTOR: Yes, Page 51. I marked it up. Each place where I put a quote, I marked down the page of the transcript. I thought this testimony was significant and I wanted to make sure we could all find it when we wanted to.

So we have Mr. Merz's statement that as far as he's concerned, the drawings weren't copied—were [16] not copied,

however, he complains that the design was copied, and the design that he says was copied, the design of the Knollwood building is what he says in his report. So we can accept that for this motion. Whether we agree with him or not for our purposes today, we can accept what he said and take whatever he said in his report—counsel can work out the details themselves, I'm sure. They have copies of the report.

And we've asked the Court to order that, number one, pursuant to Mr. Merz's testimony, the design which he describes in his report cannot be protected-because of the copyright regulation 37 CFR 202.11 Section C3, and having determined that that cannot be protected, we obey the *Kohus* and the *Murray Hill* admonitions of the Sixth Circuit and filter that out of the drawings when we compare the alleged copyrighted drawings with the accused drawings, and that's our motion.

To simplify things, I have prepared a draft order, attached to that order is the Merz report, and if the Court agrees with the request to grant the motion, we assume that will necessitate counsel sitting down together and taking the report and in effect crossing out those things that Mr. Merz said are the components of the unprotected design. Thank [17] you.

THE COURT: Thank you.

MR. WASINGER: Your Honor, I do not want to become repetitive of what we've said in our brief. I would start with the point made on Page 15 of our brief which proves why one has to read with a little greater care and a little less ellipses than this summary report. Our brief on Page 15 specifically addressed this notion that Mr. Merz said there had not been a copy. What he says specifically was that they had not Xeroxed the plans and alll you have to do, if you look at the plans, you can see one handdrawn and one was drawn by a computer, but that really isn't the point.

And this issue, your Honor, was exactly the issue that was before your Honor when we were here the last time. Your Honor will recall that they went through this lengthy list of drawings and showed, among other things, they had Mr. Johnson testify well, that can't be a copy because Mr. Merz drew his out—excuse me, Mr. Mann drew his out by hand and these fellas did it by computer.

What Mr. Merz said over and over and over again is that they copied the design, the spatial arrangement, the design that was embodied in the [18] Knollwood plans, and that's—in fact, if you read it at the place that he cites in that third column, that's the part that he specifically stated: The one that were embodied in the Knollwood building and the Knollwood drawings, correct, and he went through and dealt with that at length.

Your Honor will recall that in your October 2003 opinion, your Honor specifically made a comment to the effect that the issue of substantial similarity was an issue for the fact finder. Your Honor also made reference to the access issues, and in your opinion, you had a number of facts that demonstrated or, excuse me, that you cited as evident of the access, and I'm referring to Page 6 of your October 10th, 2003 opinion which is docket 142.

One of the things, your Honor, that you did not mention in your opinion but which I believe becomes very significant for all the motions before your Honor today is the evidence in the form of the testimony of Mr. Dominic J. Moceri, that Mr. Glieberman, who your Honor will recall admitted that he went out and looked at this and they had the brochure that showed they had taken the brochure from the Aberdeen. Mr. Glieberman specifically called Mr. Dominic J. Moceri and asked him if he wanted to [19] buy an Aberdeen project, the use of the term Aberdeen being significant, because in this particular area people understand the word Aberdeen to be a shorthand expression for this particular design which has

been highly successful in the marketplace. So the idea—nothing has changed, your Honor, about the idea of either access or substantial similarity since your Honor's October 10, 2003 opinion.

What they have attempted to do is create a legal issue based upon the *Kohus* opinion, but your Honor will recall, and I'm sure your Honor has had more experience in this area than I have, but the *Kohus* opinion, on the area that they cited as new, really says nothing new at all. It is a general principle well established in copyright law, found in Supreme Court decisions and Court of Appeals' decisions and in *Nimmer* and places such like that, that one of course has to filter out the unprotected. They have attempted to create a theory that the Knollwood building and all of its features is unprotected by relying on this distinction between architectural works and architectural drawings.

Your Honor addressed that issue as well in her prior opinion where your Honor cited to the case of *Stewart versus Abend. Stewart versus Abend* is a [20] United States Supreme Court opinion that we discuss in our brief extensively, and I think it's worthwhile to refer your Honor to the pages of our brief, starting on Page 3 through Page 8, where we address—actually through Page 9 where we address this issue, and I would start—I would like to summarize perhaps in this way.

The important point is Section 103 (b) of the Copyright Act. 17 U.S.C. Section 103(b) makes very clear the distinction between the original work and the derivative work and makes very clear that whatever the derivative work might do, it does not enlarge or affect or—and is completely independent of the original work. In this case, the original work is the Knollwood plan.

Now, why is *Stewart versus Abend* so important and why did your Honor cite it in her opinion? Because your Honor may recall that in *Stewart versus Abend*, the issue was the

movie—actually it was the movie that I think Anatomy of a Murder—no, not Anatomy—

MS. GREENBERG: Pygmalion?

MR. WASINGER: No, it was the movie that involved Jimmy Stewart and that was who the Stewart is in Stewart versus Abend where basically they had a [21] book and they had a subsequent work where the derivative work had been published and they argued that they copied from the derivative work and therefore they didn't infringe the copyright, and what the Supreme Court pointed out is that the copyright and the original work continued.

Now, they relied very heavily in that case, your Honor, on the Russell case, which is where they had the Pygmalion film and there was a situation where the copyright in the film had expired but the copyright in Mr. George Bernard. Shaw's play had not expired, and again, they argued that they had copied from the film, not from the play, and therefore was no infringement.

The Ninth Circuit specifically said that although the derivative work may enter the public domain, the matter contained therein which derives from works still covered by statutory copyright is not dedicated to the public, and I'm reading from the decision at Page 5.

Now, the reason that decision becomes important, your Honor is that when the Supreme Court took up the *Stewart versus Abend* decision, it was attempting to—it was resolving a dispute which had arisen between the circuits. There was a rule in the [22] Second Circuit that the publication of a derivative work or the entering into the public domain of a derivative work would allow you to copy from the derivative work. There was the *Russell* decision in the Ninth Circuit that said you couldn't do that as long as the original work was protected, and that's what the Supreme Court did. They essentially adopted the Ninth Circuit's view.

Now, the fact of the publication—the fact of the protection of architectural drawings is itself not a new issue and that's why, your Honor, in our brief at Page 7 we cited a very similar situation occurred when they made an amendment to the copyright statute in 1976 to deal with sound recordings. It's a little odd, as we sit around today in our, you know, digital world and realize that until 1976 sound recordings were not themselves subject to copyright. And what happened is in 1976, the Supreme Court—excuse me, the United States Congress enacted an amendment to the copyright statute which essentially said that sound recordings were now themselves subject to copyright protection, so exactly analogous to the situation of architectural plans and architectural works. You bad the underlying sheet music or whatever and then you had the sound recordings.

[23] In the case—the cases and the treatises following this *Russell* line of—and *Stewart versus Abend* line of cases has made very clear that where you reproduced a sound recording, you would infringe the copyright in the underlying music even though the sound recording itself was not subject to copyright protection.

On Page 7 of our brief, your Honor, we cite the directly analogous case of the Lone Ranger television show. I'm one of those in this room who still remembers both the radio and the television, what happened in that case is that a gentleman got ahold of same tapes of the Lone Ranger radio shows and maybe the television shows, I'm not really exactly sure, and started—and took those tapes and starter selling the tapes to the radio stations, and he claimed that he was entitled to do that because under the pre 1976 Copyright Act, those tapes were not subject to copyright protection.

And the issue in the *Lone Ranger* case, which we again cited at Pages 7 and 8 of our brief was whether that was correct, and they said no. The fact that you could not copyright the recordings themselves doesn't mean that you could

cheat on the copyright by copying from the recordings, and the copying of the [24] recordings was a copying of the underlying scripts.

Now, those cases are—directly deal with the direct problem raised by Mr Cantor, i.e., what is the effect of the architectural works enactment, and again, although your Honor did not discuss this extensively in her October 2003 opinion, I believe your Honor's reference to *Stewart versus Abend* and the principle of the protection of the original work reflected the fact that your Honor considered this issue because it's been around in this case and in the other Aberdeen cases that are in this court.

The other point that we make in our brief is the pre 1990 architectural infringement cases that were decided in this court and in the Sixth Circuit. Now, why are those cases important? Because if, under Mr. Cantor's view of law—if Mr Cantor's view of law were in fact the rule, then there could never have been a copyright infringement in any of those cases.

Why is that? Because what happened in those cases, your Honor will recall, is that someone went into a model home, and based upon the inspection of the model home, came to the conclusion that they wanted to build houses that were substantially identical to the model homes, and the cases in this district, both of which involved the Herman Frankel [25] organization, concluded that when you went into the model home, looked at the model home and then went out and build something else, you were infringing the plan, and the Sixth Circuit then decided another case, which we've cited, *Robert R. Jones Associates versus Nino Homes* 858 F.2d 274 Sixth Circuit 1988, where the Sixth Circuit came to the same conclusion.

The point is that if the model homes, like the Knollwood Apartments, destroyed any protection in the underlying copy-

righted plans, you would never have the infringement, so what all that means, your Honor, getting now to the—hopefully the summary here is that the—yes, your Honor should filter out the nonoriginal, unprotected portions of these plans. It is undisputed that all of these plans are original as that term is used in the copyright statute. Original, as your Honor recalls and as your Honor indicated in her prior opinion and as the Supreme Court made clear in *Lise* case (phonetically) simply means that it was the product of a particular author. It doesn't have to be original as somebody who's a genius might use that term to invent the theory of relativity.

The *Lise* case was a situation where they simply took a list out of the Yellow Pages, put it in another book and they said well, that's original [26] because they created their own area wide directory. That's what original means here. Nobody has quarreled with the fact that Mr. Mayotte created all of the Knollwood plans and so all of the Knollwood plans are original.

No one also quarrels with the rule, which as I indicated at the beginning, has been here long before *Kohus* that you must filter out the unprotected, but what is protected in this case is precisely the Knollwood plans. There's a valid copyright in the Knollwood plans. To the extent that the Knollwood plans are found in the Knollwood building, they do not lose their protection, and this conclusion is consistent with the language of the statute. It's consistent with the cases which decided the analogous point under the recording statute. It's consistent with *Stewart v Abend.* It's consistent with the Sixth Circuit's opinion in the *Jones* case, and it was recently addressed by your colleague, Judge Borman, in his case where he rejected the exact argument made by the exact lawyer involving this Aberdeen project. So we agree with the rule, we just don't think the rule applies in this case, your Honor, and they're not entitled to summary judgment.

MR. CANTOR: Your Honor, may I respond?

[27] THE COURT: You may.

MR. CANTOR: Your Honor, I couldn't help but note that counsel had not said a word, not a single word, about 37 CFR 202.11, Section D3, which is the basis for the present motion and which was effective as of December 1, 1990 and made this substantial transition in the copyright law.

Now, cases that existed before that time or did not concern architectural works, while very interesting in general and maybe effective as to other matters, are not pertinent to the architectural works Copyright Protection Act, which very specifically say works excluded, the following structures, features or works cannot be registered, and it says under Section 3, pre December 1, 1990 building designs, published building designs, the designs of buildings where the plans or drawings of the building were published before December 1, 1990 or the buildings were constructed or otherwise published before December 1, 1990.

And I would like to recall to your mind, your Honor, that in your decision on motions of October 10, 2003 you did find that the Knollwood plans were published and in the public domain. This is what you said on Page 5 of your opinion of October 10, [28] 2003, quote: Although Plaintiffs have published the underlying plans—and you were referring to Knollwood in a previous paragraph—although Plaintiffs have published the underlying plans and they are in the public domain, and then you went on to go from here concerning derivative works.

So these plans were published if we look back to your prior order, and there's no question the were published by the large number of buildings which were constructed that embody that. So we turn back not to the *Russell* case, which goes back to the 1960s nor to the *Jones* case or the other cases that are referred to that go back to the 1960s and 1970s, and not to the

1976 other changes in the statute. We go to this particular statute which this particular motion is concerned with and which counsel has said not one word about.

Now, as far as the *Kohus* case is concerned, the Sixth Circuit said in the *Kohus* case, and I quote from Page 1849 of 66 USDQ 2nd, quote, the Sixth Circuit has thus far not adopted a specific test for determining substantial similarity in copyright infringement cases, and then they quote a case, and this case presents an opportunity to do so, and then they go on and they talk about a two-step approach.

[29] I'm quoting, and I'm leaving out the cites—the case cites, the first step requires identifying which aspects of the artist's work, if any, are protectable by copyright, and then the cite I'll leave out. The second involves determining whether the allegedly infringing work is substantially similar to protected elements of the artist's work. We approve this method and adopt it. The essence of the first step is to filter out unoriginal, unprotectable elements and then it goes on from there.

Now, as far as this statement that there's dispute as to originality, there sure is in this case; but not for this motion: We haven't brought up there yet the conflict we have regarding originality. The Defendants have said right from the beginning that Mr. Mayotte's design was not original, based on other things about which he knew, but that's not in front of us.

What is in front of us is that one section of the statute which is on the chart and which has not been addressed by counsel and which says very bluntly, again, the designs of buildings where the plans or drawings of the building were published before December 1, 1990 or the buildings were constructed or otherwise published before December 1, 1990 cannot be [30] registered, and that's what our motion focuses on and that's where it should rest.

MR. WASINGER: Your Honor, may I briefly make one statement, since he says I didn't address this and I thought I did?

THE COURT: Yes, you may, but briefly.

MR. WASINGER: Very briefly. 3 is a sub part of D.

THE COURT: 3, pre December 1?

MR. WASINGER: Yeah, it's a sub part of D. It says the work cannot be registered. We agree that the Knollwood work cannot be registered. We have agreed to an order that Judge Roberts entered saying that the registration of the Knollwood work was improper. The issue is not whether the Knollwood work could be registered. The issue is whether the building of the Knollwood buildings destroyed the protection in the Knollwood plans which were registered. That's the issue.

MR. CANTOR: Your Honor, I'm sorry the issue is what we said in our motion.

THE COURT: Okay. All right.

MR. CANTOR: And, again, I call the Court's attention to what the architectural work is according to the statute, the design of a building.

[31] THE COURT: Okay. Thank you.

MR. CANTOR: Shall we proceed with the next one?

THE COURT: No, you all are going to have to come back.

WASINGER: That's fine.

THE COURT: I'm really sorry. You are going to have to come back. Do you want to cane back tomorrow morning?

MS. GREENBERG: We have a deposition.

MR. WASINGER: I can come back, yes, we can do that.

THE COURT: Can you all come back tomorrow morning. Will it take more than two hours?

MR. WASINGER: No, I mean, unless your Honor is more patient than she ought be.

THE COURT: Well, I'm pretty patient, but let's say come at 10:00. Me only thing is you all need to call at 9:00 because my regular court reporter is off and I'm sure that it's probably too difficult to figure out if I can get one tonight. So if you all call at 9:00, you can ask for Miss Malayang—ask for Miss Gill and she'll tell you whether or not we have a court reporter. I don't think it will be a problem but I don't want you to come down if we don't have [32] one.

MR. WASINGER: Thank you, Your Honor.

THE COURT: So 10:00, is that convenient for everyone?

MR. WASINGER: That's fine, your Honor.

MR. CANTOR: Yes, Your Honor, that would be fine.

THE COURT: Okay. All right. Thank you very much.

MR. DeGROOD: If we all talk slow, I'll write down what everybody says.

MR. LaLone: Would your Honor like a copy of the *Kohus* case?

THE COURT: No, I don't think you need to give it to me, it's all right. Thank you very much. So I'll see you tomorrow at 10:00. Thank you very much.

(The proceedings were concluded at 4:56 p.m.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 01-71403
Case No. 03-74600

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiff,

-vs-

CHARTER OAK HOMES, INC., AMERICAN HERITAGE HOMES, L.L.C. BERNARD GLIEBERMAN, CROSSWINDS COMMUNITY, INC., and PROGRESSIVE ASSOCIATES, INC.
Defendants.

BEFORE THE HONORABLE DENISE PAGE HOOD
United States District Judge
237 US Courthouse .& Federal Building
231 Lafayette Boulevard West
Detroit, Michigan 48226
Thursday, July 22, 2004

APPEARANCES:

STEPHEN WASINGER, ESQ.
Appearing on behalf of the Plaintiff.

DOUGLAS LaLONE, ESQ.
BERNARD CANTOR, ESQ.
Appearing on behalf of Charter, Heritage, Glieberman, Crosswinds.

GEORGE DEGROOD, ESQ.
Appearing on behalf of Progressive.

COURT REPORTER: Mary F. Wisneski, CSR-0231 (313-963-9432)

[2] LAW CLERK: Chirco versus. Charter Oak Homes, 03-74600. And 01-71403, Chirco versus Crosswinds.

THE COURT: Good morning.

MR. WASINGER: Good morning.

MR- DEGROOD: Good morning

MR. LaLONE: Good: morning.

MR. CANTOR: Good morning.

THE COURT: Okay. Let's proceed.

MR. LaLONE: Good morning, Your Honor. How are you?

THE COURT: Good morning. Yon all need to put your appearances on again because I have a new reporter. You may start.

MR. LaLONE: Doug LaLone. I apologize for the delay. We were stuck in traffic because 75 was closed due to the John Kerry motorcade, so I apologize for that.

And also I'd like to extend thanks to the Court for changing the date for this hearings in view of the personal circumstances with my family. We could not be here on, I think June 23rd was the previous hearing. I appreciate you accommodating our emergency schedule.

[3] THE COURT: All right. We need to all put our appearances on because we have a new court reporter.

MR. WASINGER: My name is Steve Wasinger. I'm here on behalf of the plaintiffs.

MR. CANTOR: Bernard Cantor, here on behalf of the defendants, except Progressive represented by its counsel.

MR. DEGROOD: George DeGrood, on behalf of Progressive Associates, Incorporated.

MR. CANTOR: Also Miss Patty Gorton. She's not an attorney. She represents one of the defendant corporations.

MR. LaLONE: And also, Your Honor, Doug Johnson is here, the architect. You've seen his report. Mr. Johnson and Mr. Fred Elias.

THE, COURT: Okay.

MR. LaLONE: He is an attorney but he will not be arguing here today.

THE COURT: All right.

MR. LaLONE: Your Honor, if we may I'd like to proceed to the motion we have docketed up. I believe it appears on your docket as number 147.

THE COURT: Okay.

MR. LaLONE: And that's entitled, motion for summary judgment for dismissal of count two.

THE COURT: All right.

[4] MR. LaLONE: Pursuant to the decision to answer. Before that I just want to recap something that concerned me yesterday. There was a statement made by Mr. Wasinger that Mr. Johnson had previously testified before you pertaining to those drawings. And that was in the 2003 oral arguments for our prior motions for summary judgment.

That is false, Your Honor. Mr. Johnson did not testify In fact, I had a letter in my files. Mr. - Johnson, I asked him to testify because we did not get prior notice about his appearance that day. The Court specifically said, no, he can't testify. So I need to clarify that. Mr. Johnson has not testified here before, despite what Mr. Wasinger had said.

THE COURT: All right.

MR. LaLONE: Also, yesterday I believe Mr. Wasinger said that Judge Borman on the prior case had already decided the same motion before you yesterday. That is incorrect, Your Honor. Judge Borman has not yet ruled on the motion pertaining to filtering out the unprotected elements. So we need to clarify that.

THE COURT: Has he argued before him?

MR. LaLONE: Pardon me.

THE COURT: It's been argued?

MR. LaLONE: It has not been argued yet, Your Honor. In fact, the Judge sent it back for rebriefing.

[5] MR. WASINGER: Your Honor, I did not. The motion to which I was referring, excuse me. The opinion to which I was referring is Judge Borman's opinion on the preliminary injunction, which opinion was attached to our pleadings and is a matter of record. That is the opinion to which I was referring. And I believe if Your Honor would read that opinion, Your Honor can decide whether he's decided this issue or not, or ruled on this issue.

THE COURT: Okay. All right. Thank you.

MR. LaLONE: I submit to you that Judge Borman has not conducted any filtering-out analysis as required in the Kohus—in view of our motion that was argued yesterday by Mr. Cantor, which is premised solely upon 37 CFR Section 202 which says, "architectural works; that is, building designs before 1990, December 1990, cannot be protected". That was the whole sum and substance of Mr. Cantor's argument.

THE COURT: Okay. Now, all of this is on yesterday's motion, is that right?

MR. LaLONE: I was clarifying some things on yesterday. So if I may proceed to the Dastar motion.

THE COURT: No. Before we do that, Mr. Wasinger, do you want to clarify anything else about yesterday's motion because I want to be finished with yesterday's motion.

[6] MR. WASINGER: No, Your Honor. All I want, to again emphasize is, I think Your Honor can read Judge Borman's opinion. And when one looks at Judge Borman's opinion, one will see that he examined the precise argument about the significance of the Knollwood building and made conclusions, but Your Honor can do that.

THE COURT: Okay. Now, that's yesterday's motion. I don't want to keep arguing each motion over and over. So is that the extent to which we're going to argue yesterday's motion?

MR. LaLONE: Yes, Your Honor.

THE COURT: Okay. Let's go on to the new motion, okay.

MR. LaLONE: Yes, Your Honor. Docket 147. It is. Charter Oaks' motion to dismiss count two in view of the Dastar decision. And Your Honor will note that was motioned up for the Charter Oaks/American Heritage and Glieberman case 01-71403. And that's because only count two was pled in that case which was an unfair competition claim. No unfair competition claim is asserted against Crosswinds. That is a new case filed last November, I guess, Crosswinds. So I just want to clarify. This is pertaining to the early case filed back in 2001.

THE COURT: This is your motion for summary judgment to dismiss count two of 01-71403, is that right?

[7] MR. LaLONE: Yes, Your Honor.

THE COURT: Okay.

MR. LaLONE: Thank you. Now, moving on to what was actually pled in that motion, what we're attempting to do is dismiss count two. Now, we apparently do not have a disagreement on this motion.

THE COURT: You apparently what?

MR. LaLONE: Do not have a disagreement on this motion. This motion was to strike count two which dealt with—

(Whereupon an off-the-record discussion was had.)

MR. LaLONE: Count two dealt with false designation of origin. If the Court would turn to the complaint, paragraphs 29 through 31, you will see that plaintiffs have claimed a false designation of origin count and not a trade dress count which is now apparently whether we're now moving to direct or redirect this Court's attention, which by the way, is irrelevant. But I have the complaint in this case in my hands right here. And I'll read paragraph 29 of the complaint, which is count two. I'm not sure if that's attached to our brief. If you'd check it for me and let me know-if it is.

But count two says; "defendants deliberately copied plaintiff's plans and if not enjoined plaintiff's [8] justly fear that defendants will disseminate information to the public with the intention of misleading the public as to the source or designers of defendant's housing units".

Paragraph thirty; "defendants misrepresentations have caused, or will likely cause confusion as to the origins or sponsorship of the homes marketed by defendants". And finally paragraph 31 says, "defendants false and misleading actions violate 15 U.S.C. Section 1125". That's what they're claiming.

Now, if I can direct your attention, Your Honor, to plaintiff's opposition brief, page fourteen and fifteen. In fact, do you have page fifteen in front of you?

THE COURT: No. I don't. You may go ahead, though.

MR; LaLONE: Okay. Page fifteen of plaintiff's opposition brief says "they obviously, because plaintiff's Lanham Act claim is not for reverse passing off whether or not defense have misrepresented the origin of the condominiums is

moot". They are admitting right there that they are not even making a reverse passing off claim or misrepresentation of origin claim. Your Honor, here's the language from that part of the brief.

THE COURT: No. If you want me to get-out the brief and look at it, I'll look at it. Ms. Malayang, you can pass it up. But I really don't think I need to do [9] that, counsel. You really could go ahead and make your argument. If you'd like me to follow along page by page, I will. But, you know, I really have gone through this. And I don't think you need to read the brief over, frankly.

MR. LaLONE: On page twelve again, Your Honor, the plaintiff's opposition brief states, "rather plaintiff's Lanham Act claim is based upon unfair competition via trade dress infringement". So, Your Honor, there's no dispute as to our motion. Our motion is whether or not there's a violation of false designation of origin, specifically in view of the Dastar decision. And they're conceding here that they're not even claiming that any more.

Now, that raises a different issue, whether they can now, midstream in the middle of a motion for summary judgment now claim a different cause of action. And I submit to you that that is not proper in our view and that they should be filing a motion to amend the complaint if they want to create a new cause of action. But that's not before us. What is before us is whether or not the relief requested in our motion should be granted. And I submit to you it should be granted.

Now, with that being said, the thrust here in view of the Dastar decision is that whether Crosswinds, or Heritage here; Heritage's name is on those drawings right there, the defendant, has properly identified itself as to [10] the producer of the Heritage Condominiums. And in view of Dastar, as long as we are properly identifying our condominiums there can be no violation under the Lanham Act. That's clear

with, clear, Dastar tells us that. And so what evidence do we put forth in the record to show that we are clearly identifying the source of our condominiums?

Well, if you look at Susan Gunyou's declaration, Your Honor, that's attached I believe as Exhibit C to our initial motion. She has sworn to nine different sets of documents attached to her declaration. And she says in paragraph two of her declaration; "I was personally involved in marketing and selling the Heritage condominium units where we prominently displayed the "Heritage" name on signs, brochures, contracts, correspondence, our webpage and in advertisements. At no tine did we ever refer to or present to any customer plaintiff, Chirco or Moceri's names; and at no time did we ever refer to the Manors at Knollwood and Aberdeen Village drawings nor were they ever displayed or referenced in any way at the Heritage sales offices".

It's pretty clear from this declaration, Your Honor, that they're clearly marking the things that consumers see. There cannot be any declared points of false designation. We're marking our stuff with our name. And just briefly—and I'll move off this motion.

[11] Just briefly, Exhibit 1 to Ms. Gunyou's declaration is a sign of the Heritage marquis out in front of its building. It says, Heritage. Exhibit 2 is a Heritage brochure presented by Crosswinds Communities. It says Heritage. Consumers aren't going to be confused that they're buying something from a Moceri or. a Chirco or a Aberdeen when it says, Heritage, on the brochure. It's very clear.. Consumers know what they're getting when they walk into our stores and when they get on our website or see other advertisements like you see in Exhibit.3. It clearly says our name on it. We don't ever refer to the plaintiffs in any of our materials. We don't do that.

Exhibit 4 to Ms. Gunyou's declaration, it's an advertisement. It prominently displays the Heritage Community name

right on it. That's us. On our website, Exhibit 5 it talks about the Heritage in Waterford, Michigan. That's us. Even the purchase agreement that the consumer signs, Exhibit 7 to Ms. Gunyou's declaration, it says Heritage, a residential condominium, purchase agreement. The very first thing that the consumer sees is the name, Heritage. The consumer can't be confused as to who they're buying a condominium from when the contract says, Heritage, on it. There's no chance of confusion. Even Exhibit 8 to Ms. Gunyou's declaration sets out a purchaser of information, Heritage condominium booklet.

[12] All the things that the consumers sees immediately tells them they're dealing with Heritage. And that's the focus of our motion, Your Honor. We have properly identified our materials, properly identified our buildings with the Heritage name. There can be no chance that the consumer thinks they're somehow dealing with the plaintiffs.. And that's exactly what Dastar is all about.

So we submit, Your Honor, that we've brought forth evidence that Heritage is the originator of the condominiums being sold and the consumers clearly know that It's us. They see. And with respect to the actual evidence we submitted, Ms. Gunyou's declaration has not been rebutted. That was properly submitted Rule 56 evidence that has not been rebutted.

And if you look at plaintiff's opposition brief they didn't respond to any of her arguments from the standpoint of what she was saying in there. They didn't rebut the fact that all of our materials, our buildings properly display the Heritage name. So there can be no instances of 43(a) violation. And Dastar clearly sets forth the situation here where this motion should be granted. Thank you.

THE COURT: Okay. Thank you.

MR. WASINGER: Your Honor.

MR. DEGROOD: Your Honor, just for the record, the [13] defendant, Progressive Associates, has joined in that motion with respect to the drawing aspect. I just wanted - that on the record before plaintiff responds.

THE COURT: Do you want to argue?

MR. DEGROOD: I have nothing more to argue, Your Honor. That hasn't been addressed in the briefs. I think brother counsel hit the nail on the head. The plaintiffs have not been able to substantiate; and indeed have, in their pleadings, changed their theory as alleged under count two, have never filed a motion to amend.

THE COURT: Wait a minute. That sounds like you're arguing.

MR. DEGROOD: Your Honor, that's a brief summary.

THE COURT: You can go to the podium if you want to do that.

MR. DEGROOD: Thank you, Your Honor. May it please the Court, George DeGrood, on behalf of Progressive Associates, Incorporated. We've joined in the motion for summary judgment to dismiss count two of plaintiff's complaint as well as the first amended complaint, as has already been addressed by brother counsel and has been clearly addressed in the briefs with the citations with the references to the counts in the first amended complaint. A theory has been pled. Plaintiffs have abandoned that theory in response of pleadings to the motions that are [14] before the Court today. Plaintiffs have never filed any motion at any point in time to file a second amended complaint to address the new theory that they are espousing in their pleadings.

We would submit to the Court that under the Dastar decision, the drawings as well as the buildings that were produced, clearly identify the originator of those drawings; in my case, Progressive. The drawings are before the Court.

There is no way that those drawings could be misconstrued in any fashion to be those of the architect for the Knoliwood project or the Aberdeen project. We would join in the request to have count two of the first amended complaint dismissed. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. WASINGER: Your Honor, let's start with basis. We have not abandoned any claims. The claims are the claims as pled. What we attempted to say in our brief is that we believe there would be another theory of relief. But that's for another day.

Your Honor addressed this precisely in the October issue filed on October 10th, 2003', at pages nine, ten and eleven. The specific caption of the portion of Your Honor's opinion is defined, or is captioned, "defendant's motion for summary judgment on count two, false designation of origin".

[15] And Your Honor, relying on the Sixth Circuit's decision in Johnson, it specifically found that there was a claim. The claim is that the case is Johnson v Jones, 149 F.3d 494 which Your Honor cited at page ten. That case is instructive because it gives, it proves the error in the argument. The Johnson v Jones case involved Progressive architects.

What happened in that case is Progressive architects erased the name of another architect and put their own name on the plans for a house. The exact situation. And the Sixth Circuit in an opinion which has not been overruled specifically found that under the circumstances there was not only a copyright violation, there was also a trademark violation.

Now, the sole basis for the argument is that somehow or another Dastar should change the conclusion that this Court reached in October of 2003, and that somehow or another Dastar overrules Johnson v Jones. The issue in Dastar was an issue that was based upon a rather unique kind of circumstance.

The particular problem in Dastar had to do with a television program that used some film that had lost its copyright relating to a battle in Europe. And it was based, actually, on General, and then President Eisenhower's book called "Crusading Europe".

[16] The reason the case became significant is not because it was a wholesale change of the principle that was articulated in Johnson v Jones, but rather because it dealt with a question of what the phrase, "origin of goods", in the Lanham Act means. And what they said; and I think this is the important point here, is found in the Supreme Court Reporter at 123 Supreme Court, 2041.

They said that in some reading the phrase, "origin of goods", in the Lanham Act, in accordance with the Act's common law foundations which were not designed to protect originality or creativity, and in light of the copyright and patent laws which were, we conclude that the phrase refers to the producer of tangible goods that are offered for sale and not to the author of an idea, concept or communication embodied in those goods.

Here we're dealing with a tangible good; that is to say, architectural plans and architectural work. So Dastar simply doesn't apply. The other fact that was important in Dastar is the fact that the author had lost the copyright in the particular film series and they were attempting to use the trademark law as a way of creating rights that didn't exist, that didn't any longer exist under the copyright statute. And the Supreme Court was concerned about allowing people to use the trademark laws to effectively protect against lost copyright laws.

[17] In sum, Your Honor got it right the first time. We believe that we could state an additional claim for trade dress. We don't have to state an additional claim for trade dress. We did file the pleading that they referred to but we also filed a motion to strike this brief. This motion, Your Honor, alleges,

as effectively seeking a rehearing of. Your Honor's October untimely rehearing of Your Honor's 2003 opinion. Johnson v Jones controls. Dastar doesn't change the principles articulated in Johnson v Jones. Dastar doesn't change the principles articulated in your October opinion. Thank you, Your Honor.

THE, COURT: All right. Thank you.

MR. LaLONE: I can't help but have to comment on the Johnson v Jones case, Your Honor. Bernie and I tried that case. Mr. Johnson is sitting right here. We know the facts quite well. And Johnson v Jones does not control here. It has absolutely nothing to do with the present motion, much less any reason as to why there should ever have been any liability on the Lanham Act for the defendants here in this case. And here's why—

THE COURT: Wait. Wasn't that the subject of the last motion?

MR. LaLONE: Well, he's—I'm sorry. Is this motion subject to the last motion?

[18] THE COURT: Wasn't that the subject of the motion made before that I already ruled on?

MR. LaLONE: The issue here is not. Mr. Wasinger's now trying to tie in the two.

THE COURT: I know. But are you going to argue that over? Because what I just heard you say is that it doesn't apply, right? Do you think that's a reargument of - the last motion?

MR. LaLONE: Well, I didn't raise the Johnson v Jones.

THE COURT: You're just referring to his argument?

MR. LaLONE: He's saying it's applicable.

THE COURT: Okay.

MR. LaLONE: So, and I want to address his other argument with respect to why it's not the same thing all over again.

THE COURT: Actually what he said is it's not overruled.

MR. LaLONE: Correct. He's asking you to rely upon your prior decision. And I'd like to address that.

THE COURT: My prior decision is the law of the case.

MR. LaZONE: Correct, Your Honor.

THE COURT: Okay.

[19] MR. LaLONE: Correct. Your prior decision, Your Honor, let me just address that first, right now then.

The prior motion we filed, yes, dealt with count two, and it was attacking the plaintiff's lack of factual proofs of the prima facie elements. We're not talking about that here in this case. Specifically we were attacking the lack of damages. Me were attacking the lack of economic loss and the lack .of proofs of it. We were attacking the lack of economic injury, harm, confusion, so on and so forth; all that type of different stuff.. And it had no evidence of even losing business. So we were talking about different issues, yes, for count two.

The present motion is focusing on the Dastar, which focuses on the origin of the goods. And Dastar teaches us, and the Supreme Court now shows us and tells us that in a Lanham Act case you focus on the originator of the goods. And if the defendant in this instance is properly identifying himself or herself as the originator of the goods, then there can be no Lanham Act violation.

That's different than what was discussed a year ago in your courtroom regarding the Lanham Act. Yes, you know, there are two counts in this case, count for infringement, count one, and we filed various motions on that last year. And we're here again today discussing different versions of count one

and why we're attacking [20] that. Totally different bases which, likewise count two here, Your Honor. We're attacking it on a different basis.

And in Dastar we're focusing on, like my esteem counsel said; if you look at those drawings, the names on those drawings identify Heritage or, Progressive I should say as a source and origin of that. That was not discussed before this Court before, Your Honor. So I'd just like to draw a distinction as to why we're here today pointing out a different theory as to why there's no liability for the Lanham Act.

Now, if I can just address Mr. Wasinger's argument regarding Johnson v Jones. Johnson v Jones, the defendant in that case, Progressive, had obtained Mr. Johnson's drawing through going through the city. And Progressive went to the city because the homeowner, Mrs. Jones, another defendant, said go get them, go pick those drawings up. My attorney said it's okay for you to go do that. So that's what Progressive did. They obtained those drawings from the city, went back and put their own name on it, on Mr. Johnson's drawings, and off they went.

That didn't happen here. And, Your Honor, if I could just direct your attention to the drawings in front of you, you can clearly see there has been no cutting off with scissors of Mayotte's name off the Knollwood drawings and then slapping on Progressive's new name on these [21] drawings.

And as, Mr. Johnson will tell you—in a few minutes we'll allow him to testify briefly. There's virtually no similar result between these drawings. He's going to show you detail by detail. That's not the topic of this motion here. But the point is the origin of those drawings are clearly identified. And we believe Dastar allows this Court, this authority, to now dismiss count two in view of that. Now, just in summary, I believe I already said this. There's no factual evidence to rebut it.

THE COURT: Did you supplement your motion before with this case?

MR. LaLONE: I'm sorry?

THE COURT: Or is.

MR. LaLONE: —I'm sorry. I didn't understand.

THE COURT: Did you supplement the motion that I addressed-back in October with this case as well?

MR. LaLONE: It was supplemented, that's correct, Your Honor. But t was not for the purpose of pointing out that the origin, the key investor was that the origin of the drawings being properly identified. And as Dastar says, as long as the origin is properly identified, there can be no Lanham Act violation.

THE COURT: Is there any reason why you didn't make this argument back then?

[22] MR. LaLONE: We've since had additional discovery. I believe we attached that on our. moving papers in this case. We since took the discovery of Mr. Merz, of whom we attached testimony of him to our moving papers. His deposition was earlier this year, Your Honor. As I recall Your Honor, when this new case was filed, you allowed additional discovery to be taken and we talked to Mr. Merz about that, plaintiff's architect. We asked him about the drawings, about the source and origin and identifiers on that. That's the reason why we're here today, Your Honor.

THE COURT: All right.

MR. LaLONE: Thank you very much for your time.

THE COURT: Okay. Thank you very much. I appreciate your arguments. Do you want to be heard on this again?

MR. DEGROOD: Briefly, Your Honor. I'd like to follow up on that with respect to the additional discovery. Yesterday

the Court was presented with three placards or poster boards. And the third one was the three columns of the Merz' deposition testimony from March 23rd, 200.4. And specifically at page fifty-one is the point where, and I'm going to read. I shall quote again to the Court the answer of Mr. Merz when asked to describe the drawings and the comparison between the drawings of the Progressive Architects versus those of Knollwood and Aberdeen. The [23] answer at page fifty-one.

And I quote: "Well, I'm not contending any of the drawings were replicated. I'm contending there's a design spacial arrangement that has been replicated". Question; "the ones that are embodied in the Knollwood buildings and the Knollwood drawings, correct, and the Aberdeen and others". Clearly he recognizes that the product that bears the Progressive logo is indeed distinct and not replicative of the drawings that have been prepared by Mr.—what's this gentleman's name?

THE COURT: Do you think he says they're distinct?

MR. DEGROOD: Pardon me, Your Honor?

THE COURT: Do you think he says they're distinct?

MR. DEGROOD: I think he says they haven't been replicated.

THE COURT: That's different than saying that they're distinct.

MR. DEGROOD: I think for those, Your Honor, as I understand count two, the issue for our motion is not a question of distinctness. I think that falls within the copyright.

THE COURT: Well, you said the word "distinct". That's why I'm asking you. Because I think that has a particular place.

MR. DEGROOD: It may, Your Honor.

[24] THE COURT: Let me get my question out, counsel. This gentleman on these three panels that you've given to .me doesn't say those drawings are distinct, right? I just want to be sure. Because you know, I did read it but maybe I missed it. He doesn't say they're distinct. He just says he's not contending they're replicated, right? In the part that you read he says, "these aren't replicated", but he doesn't say they're distinct, right?

MR. DEGROOD: He does not use the word, "distinct".

THE COURT: Okay.

MR. DEGROOD: In that response, Your Honor.

THE COURT: All right.

MR. DEGROOD: And I'm looking at the three panels right now. And again, he doesn't say the term, "distinct". And I'm not sure when he's rendering this testimony, he's testifying as a copyright attorney, a patent attorney or a trademark attorney, or using the words, "distinct" and "replicated" in the fashion the lay public would use them. Nonetheless, when he says the drawings are not replicated.

THE COURT: No, counsel. But you were using it. Why?

MR. DEGROOD: Well then, I apologize, Your Honor. I did not mean to mislead the Court with my language.

THE COURT: No.

[25] MR. DEGROOD: Versus the witness' language.

THE COURT: I don't mean to criticize you for misleading me. I just wanted to know if there's somewhere I haven't seen he said they're distinct.

MR. DEGROOD: Very good. Thank you, Your Honor.

THE COURT: Okay.

MR. DEGROOD: Now, as I understand the Johnson decision, first and foremost, not dealing.

THE COURT: You agreed it's not overruled?

MR. DEGROOD: I agree the case is not overruled.

THE COURT: Okay.

MR. DEGROOD: But I, for lack of a more eloquent way, I think with respect to what we've seen in Dastar, Merz' testimony, Johnson, and the facts there, that it's quite capable we're dealing with goats versus mules.

And I say that, Your Honor, because in the pleadings filed in response to these-motions we now are dealing with allegations that sound of a trade dress infringement case. It strikes me as more than just coincidental that those terms appear in this response of pleadings following Merz' testimony which, when read with Dastar, removes this case from a false designation of origin claim which is pled. Is it just coincidental we see that? No. We are now hearing from plaintiff a trade dress infringement case because that's all that could survive a [26] Dastar analysis in this matter.

And I submit, Your Honor, if there are motions filed and the Court allows an amendment of pleadings, that's another issue. But if we are now dealing with a mule that we have dealt with as a goat throughout this case and now do not have the time to develop a defense to the mule, that's not proper, and that's why we are moving for the motion for summary judgment at this time. Thank you.

TEE COURT: All right. You're welcome. All right. Do you want to say another word on this that's new?

MR. WASINGER: No.

THE COURT: Then don't repeat.

MR. WASINGER: Okay. Thank you.

THE COURT: Don't repeat. If you have a jury, I let you repeat all you want in case they didn't hear it, but I'm paying attention.

MR. WASINGER: Thank you, Your Honor.

THE COURT: Okay. All right. Very well. Thank you for your arguments on this motion. What would you like to do next?

MR. LaLONE: Your Honor, right now we'd like to proceed with docket 154 defendant's motion for summary judgment.

THE COURT: Okay.

MR. LaLONE: Of invalidity of the 237 registration [27] and the directing.

THE COURT: The reason she can't hear you is your voice is going. Maybe go to podium.

MR. LaLONE: Thank you.

THE COURT: Tell her what you're going to again, please.

MR. LaLONE: Yes, Your Honor. Doug LaLone, Your Honor, arguing the motion, docket number 154 entitled; "defendant's motion for summary judgment of invalidity, VAU, 356, 237". And directing the copyright office to cancel that registration.

Your Honor, I believe this is a fairly straight-forward matter. The order attached to our reply brief seeks to permanently dispose once and for all the 237 registration. If you don't mind, I'd like to refer to this as the 237 instead of repeating it every time. The 237 pertains to the architectural works on the Knollwood building. And.

I believe Mr. Wasinger here yesterday admitted that the architectural works copyright on the Knollwood building obviously is not valid. I'm not exactly sure of his terminology but it's no longer in force. So I believe we're in agreement on this. And the question really is the extent of what should the order read?

[28] Now, since effectively the defendants, I'm sorry, the plaintiffs, have conceded that the 237 is invalid, we would submit that we, the next step of actually getting this thing off the books—and here's the problem.

Back in 2001 there was an amended complaint in this case adding Progressive & Associates as a defendant. In that amended complaint this 237 was still being pled. The problem with that is a few months prior that in August of 2001, there was a stipulated order entered in a different case with the plaintiffs stipulating that this 237 registration is, in fact, already valid. So here in August of 2001, they're stipulating to this being valid. October of 2001 they're amending the claim adding Progressive but still asserting infringement of this 237. And yet even here the amended complaint, I should say the new complaint against Crosswinds Communities that was filed November of last year, this same 237 registration appears, and it was attached to the complaint and being pled as being infringed.

That's a problem, Your Honor. We submit that's an abuse of legal process as well as abuse of the copyright law; matter specifically a misuse of the copyright law. That's not here before you. Our goal here is to get this thing out of the books permanently so they can no longer assert it, not only in this case, but in all the other [29] cases.

The plaintiffs have sued or threatened to sue over two dozen parties. The tally keeps going. I'm sure Mr. Wasinger can give you a specific indication as to all the defendants they have sued and threaten to sue. But it's a lot. And they keep realleging the same copyrights, the same four over and over and over. And this needs to stop. This 237 should not be in this courtroom today, much less any other courtroom. So how can we do that?

We filed a motion. In response to our motion plaintiffs effectively concede; say, yep, it's invalid: They send a letter

to the copyright office and that letter was attached to the opposition brief by the plaintiffs. believe it was attached as Exhibit "B" as in "boy" to the plaintiff's opposition brief dated April 20th. Well, they sent a letter to, on behalf of Miss Greenberg who was here yesterday, sent it to the copyright office attaching a copy of the prior August, 2001, I believe, they even misidentified the date, Your Honor, in their letter.

But they apparently sent the copy of the prior order stipulating it to be invalid. The problem with that is two fold; one, there's no authority there directing the copyright office to actually do something. Say, here it is, do something with it. So what does this prior order actually state?

[30] Well, that's attached as Exhibit A to plaintiff's opposition brief. And just, it merely states that the 237 motion was granted and it's invalid. And that's it. It doesn't direct anybody to do anything. It doesn't direct the Clerk of this Court to go do something. It doesn't direct the copyright office to go cancel it on their books. It doesn't accomplish anything. And we don't even know if this letter has-actually even be sent. That's irrelevant. And here's why.

THE COURT: What's irrelevant, whether the letter has been sent?

MR. LaLONE: Correct. And here's why it's irrelevant-. We checked the copyright office records yesterday to see if the copyright office has even received this letter or ever done anything with it. Now, with Your Honor's permission I'd like to show you the record from the copyright office. May I approach please?

THE COURT: Yes. This is what now?

MR. LaLONE: Your Honor, this is a print off from the copyright office schedule of records.

THE COURT: Did you give the other side a copy of it?

MR. LaLONE: Yes, Your Honor. We ran this off first thing yesterday morning. And it shows that the 237 is still on the books at the copyright office. Free for [31] the plaintiffs to continue challenging, suing anybody they want. That's wrong. Which is why we're here. We would like the 237 to be off the record, out of the books, not to be pled ever again by the plaintiffs, not only in this case or any other case, so.

THE COURT: Let me just make sure I understand what you're referring to.

MR. LaLONE: Yes, Your Honor.

THE COURT: You're referring to this order from Judge Roberts that says that the copyright, now VAU 356237, is hereby declared invalid?

MR. LaLONE: Correct.

THE COURT: Okay. And this is an order you all presented to judge Roberts?

MR. LaLONE: Correct, Your Honor.

THE COURT: Is that right?

MR. LaLONE: Correct, Your Honor.

THE COURT: And so did you all want this order to do something different?

MR. LaLONE: No. It accomplishes its purpose.

THE COURT: Okay.

MR. LaLONE: The problem is two months later the plaintiffs in this case sued us again asserting the same copyright. So apparently we didn't think—

THE COURT: Maybe I'm misunderstanding this. So [32] now what you're asking, and so I'll be sure, is that you want me to tell the copyright office to cancel the registration, is that what you want me to do?

MR. LaLONE: Yes, Your Honor.

THE COURT: Okay. And is that what you intended to do by this order for Judge Roberts?

MR. LaLONE: Oh, absolutely not.

THE COURT: Okay.

MR. LaLONE: And the reason we didn't intend to do that is because we never thought in our wildest dreams that the plaintiff would continue to keep suing people based upon it. They—to my knowledge, at least in two instances after this stipulated order, the 237 registration has been asserted in complaints and have been attached to complaints suing people.

THE COURT: Okay.

MR. LaLONE: So we never dreamt they were going to keep doing this. I wish I would have had that aforethought to have thought of that so we wouldn't have to be here today with this motion. But we are. So if Your Honor has our proposed order, I believe you attached it to the reply brief. If you don't have a copy of it, I'll be happy to give you another copy.

THE COURT: No, I have it. Okay. I do have it.

MR. LaLONE: Your Honor, we ask for four points [33] relief, the first of which happens to be to grant this motion to cancel it. Seems reasonable; second,-that the design of the Knollwood building which is embodied in the Knollwood buildings which was constructed before December of 1990 is not comparable or protected by registration number 237.

THE COURT: Now, tell me this before you go on.

MR. LaLONE: Yes.

THE COURT: You presented this copyright search to show me what?

MR. LaLONE: To show that this letter by Miss Greenberg that she attached to her opposition brief either was never received by the copyright office and certainly has never been acted upon by the copyright office. It's to show you that this remains a registration on the books of the copyright office.

THE COURT: Okay. All right.

MR. LaLONE: And that's the best records I can get for you, Your Honor.

THE COURT: All right.

MR. LaLONE: To show that it's still there.

THE COURT: All right. Okay.

MR. LaLONE: So we're asking for your help to grant our motion, invalidate this registration again in this case since we have to—and then order the copyright [34] office to consider it cancelled. And I believe the language in the four points in our order covers that, Your Honor. Now, we did raise something different I haven't mentioned. That is in point four of our proposed order, Your Honor.

THE COURT: Yes.

MR. LaLONE: We did ask that, pursuant to 202111, I'm sorry, 202.11(c)3. That's of the 37 CFR for this Court to conclude that Mr. Mayotte, who's the applicant here for this registration, that had he given this information on this previous building being built, you know, the nineteen buildings before that copyright act had to give that information to the copyright office.

That would have precluded the grant of this registration. We're just showing that the 37 CRF statute requires copyright owner to disclose to the copyright office certain information. And had he disclosed that information to the copyright office; that is, hey, I already built this thing nineteen times, the copyright office, would it not have granted this registration.

THE COURT: Okay.

MR. LaLONE: I think that brings final closure to this matter, Your Honor.

THE COURT: Okay.

MR. LaLONE Thank you very much.

[35] THE COURT: Now, you don't really need paragraph four, right, to accomplish what you're attempting to accomplish, is that correct?

MR. LaLONE: That's correct, Your Honor.

THE COURT: Okay.

MR. LaLONE: Thank you very much.

THE COURT: Okay.

MR. WASINGER: Your Honor, the issues that were raised before.

THE COURT: Before you argue let me ask another question. Do you know whether or not the copyright office did not receive a copy of Judge Roberts' order? Mr.—

MR. LaLONE: I'm sorry?

THE COURT: Do you know whether or not the copyright office did not receive a copy of judge Roberts' order?

MR. LaLONE: I do not know that.

THE COURT: Okay. So we don't know that they don't have it and it's just in their to-do pile?

MR. LaLONE: That's correct, Your Honor. But we do know this. I have spoken to the register copyrights of General Counsel's Office and they do require an order for this Court or from a court telling them to do something; that is, to cancel this.

THE COURT: Okay. But now that could have been [36] accomplished in Judge Roberts' order, right?

MR. LaLONE: -It could have been. And again, like I said before, it wasn't. Because we didn't know they were going to come asserting the same registration over and over and over again.

THE COURT: I know. But the problem, I'm just trying to figure out, is that something that shouldn't have been done there, despite what they would have done, should it have been included in Judge Roberts' order and is it that Judge Roberts' order does not accomplish what you want to do? You just I thought said it did because it doesn't contain language asking the copyright office to do anything?

MR. LaLONE: Well, Judge Roberts' order accomplished what we were seeking that day.

THE COURT: Okay.

MR. LaLONE: Had we had the foresight to know they were going to continue asserting it, we would have asked for this additional relief, which is why we're here today.

THE COURT: I know. But if her order wasn't going to accomplish having it not result in a search that would set this up, then it could have been accomplished at that point, right?

MR. LaLONE: It may or may not have.. I can't say.

THE COURT: All right. Okay. Counsel?

[37] MR. WASINGER: Your Honor, when we had this issue before Judge Roberts, we believed that there were good and sufficient reasons why the registration, when filed was appropriate at the time. There was an issue raised about the proper interpretation of the architectural works statute.

THE COURT: This has to do with paragraph four?

MR. WASINGER: Well, it has to do with the whole thing. I want to go back, because I think that Mr. LaLone—and we, we reached agreement on specific language in an order. That's why it's a stipulated order. to avoid—

THE COURT: Judge Robert's order?

MR. WASINGER: Yes. It was a stipulated order. So that was a negotiated order that was designed to avoid a lot of what I will call the petty admissibility that subsides in this case, for reasons which I cannot explain, *Meaculpa Meaculpa Meaculpa*, when we filed an amended complaint. Somebody, and say I'm the somebody, by accident didn't excise the reference to that particular architectural works copyright.

THE COURT: 237?

MR. WASINGER: We immediately advised them that we had no intention of pursuing that copyright, that it was a mistake. It is the perils of word processing. Perhaps [38] Mr. LaLone is so perfect that Mr. LaLone never makes typographical or other mistakes. But we do.

THE COURT: Okay, Mr. Wasinger. You know, that kind of language is just designed, in my opinion, to incite-the other side.

MR. WASINGER: It may well be. But I'm incited by the fact that he insists that we somehow or another wilfully, in violation of Judge Roberts' orders, attempted to do something that was inappropriate, and that we will continue to do so.

No one has seriously believed since this case has been brought that we intended to pursue that architectural works statute. Your Honor's prior opinion makes clear that we never intended to pursue the Knollwood architectural works registration. There's not a shred of evidence that either myself or Miss Greenberg or these clients have attempted to violate Judge Roberts' order.

He now produces for the first time today a piece of paper that is called registered works database. I don't know what this means. I suspect it's like looking at the docket entry in this court. The fact that a case is dismissed doesn't mean that the docket entry goes away. We were advised, the letter that Miss Greenberg sent was a letter that the officer in the copyright office requested.

Miss Greenberg specifically talked to the [39] copyright office and said, what is it that you need. And that's what we did. Again, I don't know, I don't know if this says nothing more than, than it was registered at some time and the number's in the database. I don't know what it means. But if—I don't believe that there's a need for another order. But if Your Honor wants to enter another order advising the copyright office of Judge Roberts' order, so be it. Or if they want to go back to Judge Roberts and ask her to send a letter or communication to the copyright office, so be it.

It's the emotional background and sniping that is the source of this issue and was the source of our ultimate negotiation of a stipulated order with them. We did not, the original motion they brought in the other case was based on this, so.

THE COURT: Let me.

MR. WASINGER: Okay. Thank you.

THE COURT: Let me ask you gentlemen a question. You all are experienced attorneys in this area of the law. When this type of order is entered by a judge such as Judge Roberts' order, isn't that normally sufficient to the copyright office?

MR: WASINGER: That is my understanding, Your Honor. And that's why–

THE COURT: Do you have a different understanding [40] than that?

MR. LaLONE: Absolutely, Your Honor. This doesn't direct the copyright office to do anything.

THE COURT: No, no. That's not my question, counsel. My question is, whether or not the copyright office itself, in your past experience as a lawyer in this area of the law, and there are three of you sitting there. I bet you have this much experience, something more than the order that was entered by Judge Roberts is needed by the copyright office?

MR. LaLONE: Yes.

THE COURT: Or required by them. Then why didn't you enter that order then?

MR. LaLONE: I believe I already explained.

THE COURT: That's my same point.

MR. LaLONE: Two points. One, like I said before, we never contemplated.

THE COURT: No, no. I'm talking about your past experience in this area of the law. Has the copyright office ever required anything more of you than what's contained in Judge Roberts' order? Do you know what they require when this happens?

MR. LaLONE: Your Honor, when we had this order agreed to, we focused on one issue; and that is, getting that 237 out of one case. We weren't focusing on going to [41] the copyright office.

THE COURT: You know, that's not my-question. Understand your argument, counsel. But that is not my question. It's not my question whether or not they continued to litigate. And so you think you need something more? My question is what does the copyright office in the normal course of business require?

MR. CANTOR: Excuse me, Your Honor. May I answer that?

THE COURT: You may. Because I'm certain you must have this information, counsel.

MR. CANTOR: Yes. When we saw the letter from counsel, we requested from the office, the legal office of the copyright office, what has to be done here. And they said they have to have an order from a court, that they have no rule or authority by which they cannot—without such an order do anything. That was what we've been told.

THE COURT: When, in this case?

MR. CANTOR: In this case, yes.

THE COURT: Okay. But in Judge Roberts' case you weren't aware of that?

MR. CANTOR: Unfortunately, we assumed that Judge Roberts' order, like in a patent case, would be sufficient in patent law, a court order invalidating a patent is relied upon by everybody; and normally, a copy is sent to [42] the patent office. But apparently here the copyright office doesn't have- the same rule from what- I've been told.

THE COURT: Okay. Now this was a verbal discussion with someone in the patent office?

MR. CANTOR: Pardon me?

THE COURT: And this has never happened before in your experience?

MR. CANTOR: Not in my experience. This is the first time I ran into a situation where I was told by the copyright office that authority, that they want a court order, so, okay.

THE COURT: In the past they've taken what?

MR. CANTOR: I have no—

THE COURT: That's really my question.

MR. CANTOR: I have not.

THE COURT: In the past have you ever had the opportunity to say that a copyright's been ruled invalidated by a court?

MR. CANTOR: I've never had this experience where I've dealt with a copyright office with this kind of situation where there is an order and then we're asking for a cancellation of the registration. I just haven't had it before.

THE COURT: Okay. Now, you all had an oral conversation with the copyright office?

[43] MR. CANTOR: Yes. It was done actually by my paralegal and myself, yes.

THE COURT: Okay. So there isn't anything in writing?

MR. CANTOR: No.

THE COURT: No.

MR. CANTOR: Simply took the next step; namely, asked for an order.

THE COURT: How about from you? Is there a written document from the copyright office?

MR. WASINGER: No, Your Honor. May I briefly add to that? When we—

THE COURT: You've never had this experience either?

MR. WASINGER: We have. And I'm telling you, my experience has been very simple. When they get the order from Judge Roberts, we assume they would forward the order to the copyright office. It was when we, we realized they had not done so that Miss Greenberg communicated with them and told them that she would forward a copy herself. I mean it was our- expectation, candidly, that this was an order for their benefit, that they would take responsibility for causing the order to do whatever the order needed to be done and for dealing with it.

We went—I mean, we did it because we wanted to [44] put to rest the notion that we were somehow or another acting deceptively. And the idea that they didn't know at the time what they needed, their purpose in, they were representing Mr., they were representing Mr. Glieberman and others at the time the order was entered in Judge Roberts' case. They clearly understood and we relied on an assumption assuming that as competent people they would; a), have language they needed; and b), they would take whatever steps they needed to effectuate it.

THE COURT: Okay.

MR. CANTOR: Your Honor, may I suggest?

THE COURT: I think that you all should provide me with some information from the copyright office in writing indicating that they think Judge Roberts' order is not enough. I just find that extremely hard to believe.

MR. CANTOR: We certainly can request it, yes, but may I—

THE COURT: I just think it's extraordinary.

MR. CANTOR: May I suggest that we are really arguing about something which seems obvious. An order is necessary, we're told, to take care of this. So would you please sign an order saying so. That would end the whole discussion.

MR. WASINGER: I don't agree with that. I don't think it's necessary. And I think it's going to preside in [45] precisely the kind of emotional baggage that they're going to use and that's why they wanted the paragraph four. They want the emotional baggage of saying, we had to get, not one but two orders.

THE COURT: Counsel, you don't need to yell.

MR. WASINGER: I apologize, Your Honor.

THE COURT: I have another question. Because I don't think that I need to say a judge entered an order. I agree. This search that you turned up, it has some codes and stuff to it. When you opened it, did it say it was invalid?

MR. LaLONE: No. That's all information the copyright office would provide us. Unfortunately, when you tap on those codes it doesn't go anywhere.

THE COURT: Have you?

MR. CANTOR: Excuse me. Did Your Honor leave it that you would like us to try to get a written ruling?

THE COURT: I just think, usually when a judge issues an order, those agencies say, okay. And I'm just very surprised that they would want something different.

MR. CANTOR: Well, so are we. I would certainly be glad to try.

THE COURT:- Okay. Let's got to your next motion.

MR. LaLONE: I guess I'm still perplexed by the matter.

[46] THE COURT: I'm perplexed, too.

MR. LaLONE: We presented a motion, it's clear the registration's invalid and.

THE COURT: And what?

MR. LaLONE: And so the next question is, you know.

THE COURT: Whether or not I'm going to enter the order that he submitted, which contains, a lot more than just that it's invalid. You certainly agree with that, don't you?

MR. LaLONE: Absolutely. Could we put it back on some order and, at least maybe that will be sufficient.

THE COURT: I don't know if you are entitled to, an additional order saying it's invalid. I'll be happy to determine that at some point.

MR. LaLONE: I was—

THE COURT: I think it's clear there isn't any area of the 237. Don't you agree that's true in this case?

MR. LaLONE: In this case there's no assertion of 237. Absolutely not.

THE COURT: He just said he's not asserting it. What do you want him to do? Do you want me to have him filing something?

MR. LaLONE: Here's the problem. I'm holding a pleading filed by this gentleman dated November 14th, 2003. [47] It's a complaint against Crosswinds Communities. Attached to it, Your Honor, is registration number 237 asserting infringement. All I know is I have attorney arguments saying he's not going to assert it but I have a pleading in the court records saying they are.

THE COURT: Fine. I'll cure that. Mr. Wasinger, please submit something to the Court indicating that you are not asserting this in any way. And file it by Monday.

MR. WASINGER: Thank you, Your Honor.

THE COURT: Okay.

MR. LaLONE: Thank you.

THE COURT: And serve it on the parties so that they know you're not asserting it, since they think you would get up as an officer of the Court and say you were not asserting it and then say you were asserting it again, which I don't think you would do in open court. Let's go to the next motion.

MR. LaLONE: Thank you, Your Honor. The next motion I would like to entertain right now is the summary judgment motion for non-infringement of the Knollwood plans, registration number 356238.

THE COURT: Okay.

MR. LaLONE: And I think you might ask me what the docket entry is.

THE COURT: I do. I think it's 154.

[48] MR. LaLONE: One fifty-four.

THE COURT: Although I don't want to be held to that. Okay.

MR. LaLONE: I don't either.

THE COURT: I think it is but I don't want to be held to it because I don't have the docket sheet in front of me. Although Ms. Malayang says it looks like it.

MR. WASINGER: Is that for the dismissal of count one?

THE COURT: The name of this motion is, "defendant's motion for partial summary judgment of non-infringement of the Knollwood property right plans, VAU 356238 in brief and support filed April 1st, 2004". That's what we're on, right?

MR. LaLONE: Yes, Your Honor.

THE COURT: Okay.

MR. LaLONE: Thank you for straightening that out. Finally, the plans we have in front of us here, Your Honor, are the topic of this particular motion. There have been a lot of references in the last few hours to the plans on these two boards in front of us, one entitled, "Knollwood", and one entitled, "Heritage".

Heritage is the accused defendant plans. Now, this motion asks for partial summary judgment to dismiss this copyright. I'll call it the 238 copyright from this [49] case. So I'll refer to this as the 238 registration from here out today. So we're asking for non-infringement of the 238 registration. And that, by the way, Your Honor, is attached as Exhibit H to our motion here.

Now, as usual in a copyright case, we're looking at two things. Access to the copyrighted thing; and two, whether there's substantial similarity to the protect expression in the Knollwood plans as compared to the Heritage plans. So it's a two-prong test. And we asked Your Honor to look at our briefs, specifically on page eleven of our motion.

And I point out to the Court the testimony by Mr. Mayotte. When we deposed Mr. Mayotte; he is the architect for the Knollwood plans in front of you right here. And he said he had no—I, you know, I'm just quoting. Question; "Well, let me try again. Do you have any knowledge as to whether any of the defendants in this case had access to the Knollwood plans"? Answer: "I have no knowledge on that". We've attached that as tab six in the Mayotte transcript to our brief.

And I'm specifically referring to pages 116 and 117 of Mr. Mayotte's testimony. So on issue of access, it's clear on the record here there's no issues of access to those plans. Now, keep in mind these plans, I believe they're dated 1988, Your Honor.

[50] THE COURT: I think you ought to say for the record which plans you're referring to because-even though I know which one you walked over to, the record does not.

MR. LaLONE: Can we put a sticker on them?

THE COURT: I'm sorry?

MR. LaLONE: Can we put a sticker on them, A, B?

THE COURT: If you'd like.

MR. LaLONE: Could I trouble you for a sticker?

(Defendant's Exhibits Letters "A" and "B" are marked for identification.)

THE COURT: Are you going to mark the other one, too?

MR. LaLONE: I'm sorry. Other one?

THE COURT: Did you mark both of them? Okay. I'm sorry. I didn't see you mark the second one.

MR. LaLONE: With Your Honor's permission I have marked the Knollwood drawings as Exhibit A. And I marked the Heritage drawings as Exhibit B, to help us with this discussion here today. And the testimony by Mr. Mayotte, the architect of the Knollwood drawings, Exhibit A, is - clear that the defendants did have access. When he said, "I have no knowledge of that", to quote him specifically, so in their record we have a copyright owner saying that he has no knowledge of access by the defendants to his Knollwood drawings. And there's no other evidence contrary [51] to this.

In fact, the defendants didn't have access to those. In fact, there's been no production of the Knollwood drawings by defendants in this case because they didn't have them. Discovery's been going on and over with and the case has been going on for roughly three years now. Those Knollwood drawings were never in the defendant's files, therefore, they couldn't have been produced to plaintiffs during discovery. We didn't have them. And it stands to reason, Your Honor, those drawings were from 1988. Those drawings—we actually tried to get a copy of those from the copyright office.

THE COURT: 1988 were the Knollwood drawings?

MR. LaLONE: Correct.

THE COURT: Okay.

MR. LaLONE: They have a couple different dates of them; 1988, 1989. I believe the plaintiffs tried to get a copy of those drawings from the copyright office because we asked for, in this case, for a certified copy of the drawings that we're accused of copying. We want to know what to compare it to.

Under Kohus, the Court needs to compare the copyrighted thing to the accused thing. So we asked for that. And we

didn't get it. In fact, to date we deposed plaintiffs. We deposed Mr. Mayotte. And they can't prove [52] what was actually deposited with the copyright office. They can't prove what was copyrighted by a -competent witness.

Now, that's a problem the plaintiffs have. That's an issue not before us right here. But we needed to have something for discussion purposes today, some drawings in front of us for you to look at so you can see for yourself that there's no copying of a Knollwood set of plans. We would love to have had a certified copy of the deposited materials, but apparently they don't exist. So access, the defendants didn't have access to that. Apparently the-copyright office doesn't even have this.

Mr. Mayotte testified that he did not have any knowledge of the defendants having access to those. So what are the plaintiffs relying upon for access, the first critical element of their cause of action of infringement of the 238 registration? They're relying on pure speculation. Hearsay. Why? Well, when we deposed the plaintiffs, the testimony was, well, one of the plaintiffs said, well, my son told me they must have had them. Well, Mr. Moceri Junior's not here today. We can't ask him that question, what information he had. But it's all speculation.

And the thing they base it upon is the Freedom of [53] Information request. They said we must have gone and gotten them through the-Freedom of Information-request: These drawings are going back to 1988. There were no Freedom of Information requests ever filed by the defendants in this case to get either the Knollwood or the Aberdeen Village drawings. The Village drawings are not an issue right here in this motion. We're focusing on those plans right there on that board, Exhibit A, period.

So where does that leave us? They have no proof of a FOIA request, There's no affidavit in here. There's no

document produced by the city saying, we requested the FOIA request. It doesn't exist. So that's why it's not attached. There's no proof in here rebutting their own copyright owner's statements saying they had no knowledge of access. So that's prong one. They cannot—if they can't make the grade, they don't have the proof to rebut that.

Secondly, substantial similarity. That's where Kohus comes in, Your Honor. For the first time now the Court in Kohus gives the Sixth Circuit and all the districts here a direction as to how to measure substantial similarity. So how do we do that in this case? Well, without going through any painful filtering-out issues like we discussed yesterday I think a quick and easy measure is to actually look at the plans, Exhibits A and B before us [54] here, to see that they aren't substantially similar.

However, if you look at pages six through-eleven of our brief we set out a lot of testimony, Your Honor, by Mr. Merz, by the plaintiffs, that clearly identify and state for the record that the plaintiffs have no proof of substantial similarity whatsoever, period.

In fact, and I've, and I'm just summarizing in our brief right here, Mr. Merz, plaintiff's experts testify, and these appear, the page citations appear in our briefs, pages six through twelve. He said the plans, the Knollwood and the Heritage plans, were substantially different. He said that they did not, that he did not contend any of the drawings were replicated. He said that Heritage is not based on Knollwood. He said that they are dissimilar, these two plans are dissimilar. He said that it was not his position that any of the sheets have been copied, and. that for his opinion he did not even compare to see if any of the sheets were copied. He went on and on.

Your Honor, if I could draw your attention to that one board Mr. Cantor had for you yesterday. Can I borrow the

sheet please? Yes, the one with all the columns. There's some language on there. Right here. I'll highlight it for you. Mr. Merz testified, "it is my position"—

THE COURT: On what page?

[55] MR. LaLONE: This column right here. Looks like it's next—to have taken from page forty-one or–forty-two of Mr. Merz' deposition.

THE COURT: Okay.

MR. LaLONE: He said, "it is my position not that an individual sheet of the drawings was or not copied but that a design was copied". Well, the design is not at. issue here. Your Honor, we're talking about these pieces of paper right here in front of you. Have they been copied? Has there been a violation of the 238 registration as a result of copying? Absolutely no. Merz says no. He says they weren't copied. We'll take his word for it. And there's no dispute of fact on this. We're taking the plaintiff's experts' own testimony.

In pointing out, he agrees they're substantially different. And here he said not in the middle she was copying. Oh, here's another one. On the right-hand column of Mr. Cantor's, in fact, maybe I should mark it as Exhibit C. Can I do that?

THE COURT: This?

MR. LaLONE: Can I mark it as Exhibit C?

THE: COURT: Sure.

(Defendant's Exhibit Letter "C" is marked for identification.)

THE COURT: You don't need to mark yours because [56] I'll mark these big charts. You:gave them to me, right?

MR . LaLONE: Yes Referring to Exhibit C, Your Honor, which is entitled, "Merz", testified that the design of the

Knollwood building is described in this report, looking at the right-hand column. This exhibit shows a summary of Mr. Merz' various deposition testimony on March 23rd of 2004; new evidence, new information we come across with new discovery here. Mr. Merz says, and I quote. "Well, I'm not contending any of the drawings were replicated".

THE COURT: Page fifty-one?

MR. LaLONE: Yes, Your Honor.

THE COURT: Okay.

MR. LaLONE: It's pretty clear. We agree. We don't dispute them on that fact. The fact of the matter is, Your Honor, the Knollwood drawings were not copied. I could go on and on. But the brief itself speaks for itself, Your Honor. The plaintiffs, and again on page 147 Mr. Merz said that they're dissimilar, the two plans are dissimilar. I don't know if I had that on that chart there but that's on page seven and eight of my opposition brief. I don't know how many other ways we can put it.

But let's rely upon Mr. Merz, plaintiff's expert. 'The guy says they're not the same. When the threshold is that they're substantially similar, then we would submit [57] they don't meet that threshold. And again they don't meet prong two.

Now, with a few minutes of the Court's assistance and indulgence, I'd like to ask Mr. Johnson just to point out the differences between those plans. And you can ask him any differences or questions you may have. And again, this is just focusing on whether or not the 238 registration is not infringed. And we have to do that by looking at those plans. And in view of Kohus that tells us we can use an expert to look at the copyrighted thing, the plans here and compare it to the accused thing; that is, the Heritage drawings and for that expert to make that analysis and to render his opinion.

THE COURT: Now, does he do that in any other—it's in

his deposition, right?

MR. LaLONE: No. We're not talking about—I didn't cite Mr. Johnson's deposition.

THE COURT: But does he have one?

MR. WASINGER: He has both an expert report and a deposition, Your Honor.

MR. LaLONE: He has an expert report, Your Honor.

THE COURT: I am not making myself clear.

MR. LaLONE: Okay.

THE COURT: In Mr. Johnson's deposition or in his report does he do what you're asking him to do here today?

[58] MR. LaLONE: Not in this level of detail, and I think to save you a lot of time—

THE COURT: I know, but do you think that's an unfair advantage to you then, to the plaintiff, who won't have this before him to respond to?

MR. LaLONE: Oh, absolutely not. Because, Your Honor, when we filed our motion, page fourteen, we said defendants request oral argument on this motion and for live testimony by Mr. Johnson.

THE COURT: I know. But there's no way he knows what that testimony is going to be if it's not in his dep or in his report, right?

MR. LaLONE: Well, I don't know if we attached actual deposition testimony, to be honest with you. But with respect to his report, Your Honor—

.THE COURT: I don't think you understand my question. My question is, it's not in his record and it's not in his deposition testimony. Is it unfair surprise to the plaintiff what he's going to say?

MR. LaLONE: Absolutely not.

THE COURT: Why? What notice do they have of it?

MR. LaLONE: I'm just—

THE COURT: Of what he's going to say? This just says you want him to testify, right?

MR. LaLONE: Well, we talked about it in the [59] brief, about some of the things that Mr. Johnson reports. It's not a surprise what he's going to say. He's going to point out in detail in about five or ten minutes-the differences between the two plans which you could spend a few hours in reviewing his fifty-page report. But I think in five or ten minutes we can get to the heart of the matter and focus on this motion.

THE COURT: Okay. But, you know, in a Rule 56 motion I decide based-upon the pleadings, the depositions, the answers to interrogatories, admissions, affidavits and the like, don't you agree?

MR. LaLONE: Yes.

THE COURT: Okay. And this is-live testimony to which the plaintiff will not have an opportunity to have read in your brief and responded to?

MR. LaLONE: He can respond to it. He can respond. He can ask Mr. Johnson any questions he wants.. We have no qualms. I think Mr. Wasinger knows quite well what Mr. Johnson's going to say. I don't think there's going to be a problem.

THE COURT: Perhaps. I don't actually know that. But do you have any objection to this, Mr. Wasinger?

MR. WASINGER: I do, Your Honor. And for the same reason we went through this exercise before. Mr. Johnson has a report with a whole series of slides. We went [60] through those slides the last time. These buildings - haven't changed since the last time.

And there's no basis for an evidentiary hearing. We'll have an evidentiary hearing at the trial. If you want to have an evidentiary hearing, then we should have Mr. Merz also come in and offer evidence as to how they've distorted his testimony and how he really does believe that these things are so substantially similar as to be impossible for it to occur without copying. That's what Mr. Merz' testimony is. So, but if we want to have an evidentiary hearing, we're not prepared to do it today. And it's not appropriate under the rules. Then that's a mini trial. Let's have a real trial.

MR. LaLONE: Your Honor, the issue before you in the last motion dealt with a different copyrighted issue. And we had a power-point presentation. And Mr. Johnson was going to, because you—through—and identify the difference on that. And the only objection Mr. Wasinger raised then was that we didn't give him prior notice. So we gave him several types of prior notice here, including letters in the actual brief.

THE COURT: And is this going to be the same power-point presentation?

MR. LaLONE: Oh, absolutely not. Mr. Johnson is going to stand right there in front of you.

[61] THE COURT: Mr. LaLone, I think you're missing my point. My point is that it-sounds like-I'm-going-to hear something new that is not previously before anybody. Is that right?

MR. LaLONE: I would disagree with that. Can I point to Mr. Johnson's report then?

THE COURT: Yes.

MR. LaLONE: Point out where he's just going to summarize and help you get through the differences. On tab, let's see, Mr. Johnson's report, looks like it's Exhibit 1 to our motion.

THE COURT: And does his report delineate the differences?

MR. LaLONE: In great detail. And if you look on page three through, I believe sixteen.

THE COURT: And there are columns and columns of this, right?

MR. LaLONE: Yes.

THE COURT: In written form, right? To which Mr. Wasinger has the opportunity to respond because it's in writing.

MR. LaLONE: Absolutely. It's in detail ad nauseam.

THE COURT: Okay. So I don't need to do that. If you thought that you needed to save me, then you should [62] have pinpointed precisely what you were referring to.

MR. LaLONE: Or—

THE COURT: And then it wouldn't be a problem. Okay. So refer to the report. It's something that Mr. Wasinger can't claim he has any surprise by or any lack of preparation and I can be sure that nothing new will be said?

MR. LaLONE: Okay.

THE COURT: Fine. Go ahead.

MR. LaLONE: Mr. Johnson or not.

THE COURT: No. Tell me, the differences from the report presented to you.

MR. LaLONE: All right. Well—

THE COURT: I mean, I have the report already. You didn't want me to read the whole report. You should tell me that ahead. You attached it to your pleading. I think I'm supposed to read every page of your pleading. Just tell me that you have that expectation and you don't expect me not to

look at it.

MR. LaLONE: Absolutely, Your Honor. I'm glad that you have looked at this. My point with Mr. Johnson is to have him very succinctly show to you the difference on the sheets.

THE COURT: No, counsel. Go through your report. I don't think I need anything other than the experts' [63] report in their previously taken testimony. I don't think the rules call-for it.

MR. LaLONE: Actually, there's not been any testimony by Mr. Johnson on this point. In fact, I can specifically preclude.

THE COURT: That's my point. He's specifically precluded by whom?

MR. LaLONE: You, Your Honor. You would not allow him to testify.

THE COURT: At another motion?

MR. LaLONE: That's correct.

THE COURT: That doesn't preclude you from asking him all these questions in a deposition, counsel.

MR. LaLONE: He's my witness. I wouldn't depose my own witness, Your Honor.

THE COURT: Well, was he deposed?

MR. LaLONE: Did we ever depose him for this case?

MR. CANTOR: No.

MR. LaLONE: I don't believe he was, Your Honor.

THE COURT: Okay.

MR. LaLONE: I could be wrong.

THE COURT: Counsel, come and look at it. Let's take a break.

(Whereupon an off-the-record [64] discussion was had.)

THE-COURT: You may be seated. The record-should --- reflect we had a discussion off the record and I've indicated, again, my reasons to why I think Mr. LaLone needs to go and argue the report and the drawings which have been marked as exhibits and have not been objected to. And I wish he would go forward and do that.

MR. LaLONE: Your Honor, may I approach the drawings?

THE COURT: You certainly may.

MR. LaLONE: Thank you. Your Honor, if I briefly may just show you a few different things with respect to the drawings marked Exhibit A, the Knollwood, and the Heritage, marked Exhibit B.

THE COURT: Okay.

MR. LaLONE: In total we have twenty-two sheets of Heritage drawings. Fifteen of these sheets are nowhere to be even found in this set of Knollwood drawings, Exhibit A. They're simply not in there. Now, the Knollwood drawings has six separate types of drawings; floor plans, first floor, second floor, foundations, etc. That's six different basic sheets. Of those they have copies of these that are repetitive, little different versions. So really we're talking about six different drawings for Knollwood and twenty-two different drawings for Heritage. A clear [65] difference in the number of drawings at issue in the case. For example, if-you-look-at the first, and I'm pointing-you to the Heritage drawings, Exhibit B. Heritage has a cover page. And I believe these have been marked as Exhibits D-198 through and including D-220.

THE COURT: B?

MR. LaLONE: "D" as in "Douglas".

THE COURT: Okay. But that's now marked B?

MR. LaLONE: This is Exhibit B. But these previously, the Heritage drawings previously had some bates numbers on them.

THE COURT: All right.

MR. LaLONE: The first several sheets of Heritage drawings, as you see, are cover pages, site plans, notes, general notes, specifications and on and on. So exhibits D-198 through D-220 of the Exhibit B Heritage drawings don't even exist in the Knollwood drawings. We just look through these here and I'll be glad to have you look through them later on. There are no notes, no specifications, etc. These corresponding drawings with Heritage don't even exist in the Knollwood set. They're not there to be copied. So let's just move on to the foundation plans. Let's find a foundation plan for Knollwood right here. By the way, Exhibit A, the Knollwood plans have been previously marked in the depositions as [66] Exhibit 11 through 28.

THE COURT: Okay.

MR. LaLONE: And that's what's on this board, Your Honor. That's in a deposition in a different case. And by no means did we ever submit that these are the deposit materials. But then again, these are the only drawings that we have of discussions here today. As you can see from these foundation drawings this foundation plan for Heritage is not the same as this foundation plan for Knollwood. They're not copies of one another. We have notes here. We have different title blocks. We have details up here.

THE COURT: And you're referring then to Heritage?

MR. LaLONE: To Heritage, correct. None of those items appear on the corresponding foundation plan for Knollwood, Exhibit A.

We speed forward. The first floor plan for Knollwood in Exhibit A, let's look at the first floor plan for Heritage. Here

we go. Well, if I can direct your attention to this. I have a first floor plan here, Exhibit A, for Knollwood. That's Exhibit 12 to a prior-deposition entitled, first floor plan, Knollwood Manor Apartments. You can see that. The scales are not even the same. This is a quarter sale. Knollwood is a quarter scale.

The drawing over here by Heritage is an eighth [67] scale drawing. And Heritage shows the entire building first floor-plan. Plaintiffs don't-even show the-entire building. It's a corner of the building. They're not even representing the same. How plaintiffs can say that this drawing here, Your Honor, marked D-205, of our Heritage Exhibit B is a copy of the Exhibit 12, Knollwood drawing is absolutely preposterous.

Your Honor, I can leave these here for you to go through and I think you'll would agree with us that these simply are not the same drawings. The text is different. The scale is different. The Knollwood is drawn by hand. Every sheet of these, it's the old fashioned way. It's drawn by hand. Here, Heritage, it's a computer-generated drawing. And if Mr. Johnson was here to ~~testify,~~ I guess we don't need him to testify on this point. Clearly Heritage is not a photocopy or a tracing or a mylar or a reproduction of the Knollwood drawings.

And that's the only issue here is this Heritage drawing substantially similar to the protected elements of this Knollwood drawing, Exhibit A. And they're not. Let me just add in this one final analysis. Here's a first floor plan for Heritage. It has a bates number D-210.

THE COURT: Does it have an exhibit number?

MR. LaLONE: Yeah. That's our Exhibit B for today.

[68] THE COURT: D-210.

LaLONE: Correct.

THE COURT: Okay.

MR. LaLONE: It's called, first floor plan. Let me show you something here, Your Honor. I'm just going to take a highlighter and outline that, the wall. Okay. Let me highlight the first floor plan out of periphery for the Knollwood. And I'm referring to a sheet, Exhibit 20, of our Knollwood Exhibit A today.

Your Honor, I just highlighted in orange for you to show even the first floor plans. If you just draw a line to follow it. I mean, the Knollwood has a lot of; more indentations, a lot of more cuts, curve lines. They're not a copy of one another. If you were to place the Knollwood on top of the Heritage, you would not get the same drawing. It's totally different, which just lends credence to what Mr. Merz said. They're substantially different. And we don't disagree.

Which is the very substance of our motion is why the 238 registration should be found to be not infringed. We think they have not raised a material issue in dispute. In fact, if you look at the plaintiff's evidence responding to our brief, they didn't even respond to Mr. Johnson's report on these particular details. The plans are different, sheet by sheet are different. Fifteen out of [69] the twenty-two sheets of ours are not even present in the Knollwood set of drawings-that-are-before-us-here-today. They can't be a copy of one another. .So with that in mind I will be asking the Court to enter an order for a finding that the 238 registration is not infringed. Thank you.

THE COURT: Thank you.

MR. WASINGER: Your Honor, this is a, essentially asking you to revisit what you've done in your October 10th opinion.

Under the guise of looking at Kohus, Your Honor will recall, however, if you look at the opinion that this Kohus issue had been heavily briefed in a couple of different ways, most directly in regard to the Magistrate Judge's June 11th, 2003 order where they wanted to strike Mr. Merz' affidavit

because Mr. Merz' affidavit did not comply with the Kohus standards. And Your Honor, on pages fourteen and fifteen of your opinion-rejected that motion.

And what the Magistrate Judge had done in her opinion which dealt with Mr. Merz' affidavit, there in its Rule 26 report is conclude at the time before Kohus was decided, it was unclear whether the Court would use only an ordinary observer test or whether the Court would use the opinions of experts in certain kinds of copyright cases. There was some opinions going around. But most of the opinions suggested that the Court should use an ordinary [70] observer test and should not look to expert reports.

We submitted-an-expert report- of -Mr. Merz in support of, in opposition to the summary judgment motion because we believed that architectural things are the sorts of things that a court needs the benefit, or a fact finder could reasonably use the benefit of an expert.

The Kohus opinion agreed that in certain kinds of cases that was appropriate. And in fact, the Court, the Kohus case relied very heavily on a case out of the District of Columbia Circuit involving an architectural copyright case. So if we now look at, and that's what Your Honor did. And Your Honor, in fact, referred to the affidavit of Mr. Merz' report. The Court also looked at the testimony through affidavit of Mr. Johnson, compared all of those things and came to the conclusion that there was at least a fact issue as to whether the, there was substantial similarity.

Now, the point here is that, and this gets to an issue, Your Honor, also addressed. They're suggesting for purposes of this motion that they only want to look at the Knollwood plans versus, as compared to the Aberdeen plans. But that's a distinction without a difference, Your Honor. Mr. Merz' testimony, the testimony of the various plaintiffs that we provided in support for the summary judgment motion, the affidavit of Dominic J. Moceri there [71] and the testimony of

Mr. Mayotte made very clear that the fundamental design of the Knollwood building is reproduced in the Aberdeen plans. Excuse me, of the Knollwood plans, as reproduced in the Aberdeen plans and in the Aberdeen building. And it's clear, as Your Honor has indicated in the prior opinion that the derivative works are protected as much as is the original work.

And that it is also clear in the case law, and this has been the subject of significant briefing, that where you infringe the derivative work, you also infringe the original work. So while Your Honor did not specifically in her October letter use the word, -"Knollwood", Your Honor did on page five of that opinion point out that the plaintiffs are the owners of both the original Knollwood plans and the derivative works in the Aberdeen plans. And so I think what would be fairly read from Your Honor's opinion is that when she used "Aberdeen", she was, Your Honor was using that as a shorthand for both. To the extent that wasn't the case, again Mr. Merz' expert report is very clear.

What all of this exercise by Mr. LaLone is about is legally irrelevant as those terms are used in summary judgment motions. For a fact to be material, Your Honor, as Your Honor notes under Anderson and the subsequent cases, it has to be something that would be outcome [72] determined. We had never said, we are not saying now that they took the Knollwood plans to Kinko's and copied them. We are saying that they copied them as those terms are used in the copyright act; that is to say, that they have, they are substantially similar in material respects. That is precisely what Mr. Merz said over and over again. Mr. Merz testified that there is no possibility in his professional opinion that a person could have come up with this design by chance without copying them.

Mr. Merz' background is significant, Your Honor, because he was a professor at the University of Detroit. He has a

degree in design from Cranbrook and he is a practicing architect-in the City of Detroit. So that professional opinion by itself is sufficient to create an issue of fact. And the idea that they could go in and repeatedly ask him, are you saying, in essence, that they went to Kinko's and-copied these and he answers no, and they say, well, that proves that he agrees there's no copy, is immaterial because it uses the wrong legal standard. And Your Honor said that in her opinion. She said substantial similarity does not mean exactitude.

On the access issue, Your Honor, you went through significant deposition and other evidence on page five and six of your opinion. In addition to him, as I mentioned yesterday, there is the very significant fact that[73] Mr. Glieberman, who Your Honor will recall is the principle [sic] here and who had the plan, and who, as Your Honor pointed out on page six of the opinion, that they had the Aberdeen brochure and that they discussed the. Aberdeen brochure within Crosswinds well before the Heritage project began.

In addition to all of those facts, there is the fact that Mr. Glieberman called Mr. Moceri and told him he had an Aberdeen to sell. Mr. Moceri testified to that. Mr. Moceri also testified to the fact and Mr. Glieberman confirmed, and exhibits confirmed, that when Mr. Moceri was not interested in purchasing that project, that Aberdeen project, he took the drawings to a Mr. Lombardo, Anthony Lombardo, and tried to determine whether he wanted to buy. that. Now, that fact is relevant not only to access. It's relevant to substantial similarity. And it's relevant to the trademark infringement cases. But I'm focusing on here because of the fact that that's among the evidence.

Now, we're not asking you to move for summary judgment in our favor, although I think Mr. Merz' testimony and the actual comparison makes that compelling. We're simply asking you what's new since the last opinion. And there is nothing new since the last opinion. Mr. Johnson's report was

done before the last opinion. They did, again, take Mr. Merz' deposition. But Mr. Merz' deposition is substantially similar to his Rule 26 expert report and to [74] his affidavit. So that's the answer on that, Your Honor.

And- again my-point -here .is, by phrasing what they tried to do to avoid the rehearing route is say, well, now we're just moving on the Knollwood. But the infringement, access to the derivative is access to the original, and infringement of the derivative is infringement of the original. So if one assumes for purposes of argument that when the Court used the word, "Aberdeen", the Court was not intending to refer to both the Knollwood and the Aberdeen plans, then it is simply a logical and legally necessary extension to say infringement of the Aberdeen is also infringement of the Knollwood. Thank you, Your Honor.

THE COURT: All right. Thank you, counsel.

MR. LaLONE: I couldn't help but notice but in Mr. Wasinger's comments never once did he refer to the evidence relied upon in his brief to oppose this motion. And I guess I need to redirect the Court's attention to what this motion was about.

The motion is about Whether or not the 238 registration regarding the Knollwood plans has or has not been infringed. All this discussion about Aberdeen Village is irrelevant, so on and so forth. So let's look at what Mr. Wasinger attached to his brief because some of the things he was saying he was relying upon, I don't see being referenced and relied upon in his opposition brief.

[75] So I have a copy of his opposition brief right here, Your Honor, entitled, "plaintiff's brief in opposition to defendant's renewed motions for summary judgment", dated 5/18/04. What does he rely upon? Exhibit A? A copy of the Mattel case. Well, that doesn't count. Exhibit B, a copy of this, a copy of a prior order by Judge Borman, denying plaintiff's

motion for preliminary injunction. That doesn't count because that has nothing to do with whether or not these Knollwood plans have been infringed which is the only issue in this motion right now, right here. Exhibit C is a copy of a '97 license agreement. That has nothing to do with whether or not the Knollwood plans have been infringed. And Exhibit D is a confirmatory addendum to that same license agreement.

Your Honor, none of the evidence attached to the brief disputes the fact that Mr. Merz testified to all these different things I said before. They're different. In fact, he didn't compare these drawings probably because they're so different.. He didn't want to give an opinion that they were infringing when he knew he couldn't. Because if you look at them, I hope you'll agree with me; Heritage is not a copy of Knollwood. Mr. Merz certainly agrees that that's the case. So where's all this proof Mr. Wasinger's relying upon? I don't see it here. So let's rely upon the record, the record that the plaintiffs made [76] in opposing this motion. Nowhere do they dispute. the unrefuted stages of Mr. Mayotte

THE COURT: She didn't get the name. Mr. Mayotte.

MR. LaLONE: Mr. Mayotte did not dispute that the defendants did not have access. He didn't have any proof of it. And he should know, he's the guy that owns the drawings back in 1988. His office apparently did those. If anybody knew about access, shouldn't that guy know, the copyright owner? Absolutely. And he testified that he didn't have any proof of access. That was the sum and substance of his testimony. Access to all these issues referred to regarding Aberdeen Village has nothing to do with what we're talking.

Right here right now there are four causes of action that they assert in the complaint, four copyrights, four registrations. We just had an in depth discussion regarding the 237 which I hope you'll agree with us is invalid and should not be in the case. Thanks.

THE COURT: Counsel, everybody agrees with that.

MR. LaLONE: I'm trying to focus on what's at issue in this case, in this particular motion.

THE COURT: Two thirty-seven is not at issue in this case.

MR. LaLONE: Thank you. So let's move on to the next one. The purpose of this motion is or is not VAU [77] 356238 infringed. That"s the registration purportedly for the Knollwood drawings. That's what's here. So all these other discussions regarding Aberdeen Village, it's a smokescreen, Your Honor. It's a side attraction trying to distract the Court from the evidence we made a record and that we're asking you to consider under Rule 56, which clearly points out that there's no evidence of record to refute that the copyright owners owned the statement and have no personal knowledge of the access; and two, all of the reams of information we submitted in our brief about no substantial similarity between the plans. And again, for those records, see Mr. Johnson's record. So we think we made the case that the 238 is not infringed and we ask that you enter an order on that point. Thank you.

THE COURT: Okay. Thank you.

MR. WASINGER: May I just make a point, Your Honor, and I'm not re-arguing?

THE COURT: If you have made it before, you do not need to.

MR. WASINGER: No. I want to say maybe again in an excess of caution; we refer specifically on page fifteen of our brief to the materials we relied on, which were the materials filed in opposition of the first summary judgment motion. We did not attach those again to the brief.

They are in the docket. We refer to the docket [78] number. And hopefully Your Honor will believe that in light of,

particularly the fact this has been briefed before, that those materials we submitted in opposition in summary judgment.

THE COURT: All right.

MR. LaLONE: One brief comment. Your Honor, this issue of infringement of 238 has not ever been briefed before. What was before you last year was infringement of an Aberdeen Village registration.

THE COURT: I heard that, too.

MR. LaLONE: Thank you.

THE COURT: Okay. Anything else on those?

MR. CANTOR: Excuse me, Your Honor.

THE COURT: On this motion?

MR. CANTOR: Excuse me. May I approach? May I give this to the reporter? She's obviously having trouble spelling.

THE COURT: What, Mr. Mayotte's name? Okay. Do you want to see it, counsel?

MR. WASINGER: No.

THE COURT: I think, it's probably.

MR. WASINGER: —Anything that helps court reporter at this point is a good thing.

TEE COURT: Your next motion?

MR. LaLONE: Yes, Your Honor. Referring to docket [79] 150. Your Honor, this further motion entitled, defendant's count one, in violation of copyright claims, dismissal of count one (violation of copyright act claims of reproducing and distributing). -That's the caption on our motion which, Your Honor, this is a sub-part to count one of the complaint. And to direct your attention to why we have to talk about this is because under Section 106 of the copyright statute plaintiffs have apparently broadly pled a claim for copyright infringe-

ment, but they never told is whether they're accusing us of reproducing the drawings, preparing derivative works or distributing copies publicly.

So this motion seeks very simply to focus in on the narrow issue at whether or not defendants should be granted summary judgment on the motion that there's been no reproduction or distribution of the plans at issue in this case, the plaintiffs plans at issue in this case. Now, with that in mind, Your Honor, I have a copy of Section 106. Do you want this?

THE COURT: Are you going to refer to it or read it aloud? You may pass it up.

MR. LaLONE: Okay. Thank you.

THE COURT: Okay.

MR. LaLONE: Okay. Now, why are we here? This particular motion is an issue because under the copyright [80] statute the copyright owner has certain rights. Well, the plaintiffs here are not the copyright owners. It's Mr. Mayotte, the man who's name appears on that. So in this -. case there's a license agreement. And there's also an issue under Section 106 which rights have been infringed. This motion is focusing on whether or not there has been a violation of Section 106(1), right to refuse, or Section 106(3), the right to distribute copies or photo records of the copyrighted work to the public by sale or other. transfer of ownership, or by rental, lease or lending.

So where's the evidence? Plaintiff's opposition brief focuses on the entire interpretation of the Mayotte license agreement. And Your Honor, that's not what's at issue here, and I'm sure Mr. Wasinger may be talking to you about that. We're not talking about the license agreement for purposes of this motion. We're merely trying to get a finding that there was no violation of 160(1), 106(3).

So if we can accomplish that today, what would be left is whether or not there's a violation under Section 106(2); that is, whether or not the Heritage buildings or drawings on derivations of the Knollwood or village building drawings. Okay. So that's where we're at. Now, if you look at our opposition brief, again, we point out statements by Mr. Merz.

THE COURT: Now, I'm looking at their opposition [81] brief?

MR. LaLONE: Actually if you look at.

THE COURT: I'm looking at your brief, right.

MR. LaLONE: Right.

THE COURT: Okay.

MR. LaLONE: And I'll give you a page number here, Your Honor. On page five and six of our brief, Your Honor, without going back through it again, that summarizes the evidence we're relying upon under. Rule 56. And again, found on page five, we cite Mr. Merz. He said, "I am not contending any of the drawings were replicated. The individual sheets were not replicated". Well, he agrees. The drawings weren't reproduced.

So grant us our motion that there's been no violation of 106(1), the right to reproduce the drawings. We're basing this motion on plaintiff's expert's own testimony. Mr. Merz also stated, and I'm at the top of page six of our brief. He says Merz testified that it, and it was a quote there, "with a photo, photographic reproduction of the plans". Again, on thirty-four, Mr. Merz said he did not compare sheet by sheet, detail by detail, note by note. That was not his opinion.

So, and it even asks the plaintiffs in this case what knowledge did they have about reproduction and distribution. And we cited to Mr. Moceri's deposition, [82] Exhibit G to our brief, page 104, where he did not have any knowledge of defendant's ever reproducing or distributing the Knollwood

or Aberdeen Village plans. Okay. We're in agreement. There can't be a violation of, when plaintiff's expert and I agree all on the same thing. No. So our briefs goes on and on and on and cites specific instances where the plaintiffs have not come forward with any evidence. In fact, the plaintiff's own witnesses are supporting this motion.

And again, the reason stands because there has not been any replication of the Knollwood drawings or the Village drawings. There's been no actual distribution of those drawings by any of the details to anyone. And I think Mr. Wasinger's statement earlier is—I'm trying to publish in context with what he said, but I believe he said those drawings were replicated. I. can't remember the exact term that he used. But we're in agreement that those Knollwood drawings in front of us right here have not been reproduced. And they have not been distributed. And the evidence in the record supports that.

So since there's no disagreement here, we submit that an order should be entered under count one granting our motion for partial summary judgment that there's been no violation of 17 U.S.C. Section 106, paragraphs one or three. If you look at our reply brief, Your Honor, we [83] actually attached a proposed order and it had four forms of relief. And that specifically is what we're looking for here.

If Your Honor has any questions regarding that, I would be happy to go through that. That's what we're looking for. Thank you.

THE COURT: Okay. Thank you.

MR. WASINGER: Your Honor, they're asking the Court to engage in an absurd reading of the statute that ignores hundreds, or a hundred or more years of statutory construction of case law. We believe that they have violated-one, two and-three.

Remember what we're talking about here and remember the statutory context. Copying does not mean going to Kinko's. Copying means, did you do something that has substantial similarity in its material features. How did they reproduce the copyrighted working copies of photographs? Not obvious in photo records but in copies. The buildings are copies. And the buildings are copies of not only the plans but the Aberdeen buildings. Those are both copies. The plans are copies. And the brochures and advertisements which they used are copies, or contain copies. How did they distribute the copies to the public by sale or otherwise? They sold the buildings. That's basically what they did. And they distributed copies of [84] the plans as reflected in the brochures and advertisements by handing them out to people.

So one, two and three are all violated. The reason that two is violated is that in some insignificant ways they tried to, as Mr. Chirco said, change the color of the dress or the lipstick on the lady. But you know, this is the silliest thing.

It's like saying, well, Mickey Mouse, I didn't copy Mickey Mouse because look, he has a yellow beak in the Disney stuff and we put an orange beak on him. And to the extent that one wants to argue that the orange beak is somehow or another directive from the yellow beak on Mickey Mouse, then that's a derivative work and that's a violation as well. So that's what our response is on the 106.

THE COURT: All right. Would you like to reply?

MR. LaLONE: Briefly, Your Honor. Your Honor, we would just like to rely upon the evidence of record where Mr. Moceri testified he had no personal knowledge in that the defendants reproduced and distributed drawings. Chirco testified he had no evidence, against reproduced the drawings. And Merz testified, "I'm not contending any of the drawings were replicated". Now, this is a distinction with a difference. 106(1). Reproduction means, did you put the things in a copy

machine and replicate them. Did you put one over the top of the other and trace it. [85] Absolutely not. And I believe Mr. Wasinger will agree with me that Knollwood, strike that, that Heritage is not a tracing or a photocopy of Knollwood. I think it's pretty plain to see that they're not. Heritage drawings are not a reproduction of the Knollwood drawings.

On the distribution it's even a farther stretch for them to make the argument that somehow we have distributed copies of the Knollwood drawings. We didn't even have them. The plaintiffs can't even find a certified copy of them. They're apparently not even available for the copyright office. These things were done back in 1988 and there is no record anywhere that the defendants had the Knollwood drawings in front of then. You can't distribute something you don't have. There can't be a violation of 103. And that's why we left for this Court the sole issue of whether or not there's a violation under 106(2) for the issue at trial. We're trying to focus this down.

And I'm glad Mr. Wasinger clarified for us that he's asserting all three that we reproduced the drawings, we made derivations and that we distributed copies. We now for the first time have seen him say they're accusing us of doing, all three of us, which is all the more reason why we need to get you to grant motion in our favor, to focus this case down on whether or not the Heritage buildings or the Heritage drawings are derivations. And that's a 106(2) [86] issue. And that's not before you here on this motion. Thank you.

THE COURT: Okay. Let's go to your next motion. There's one more, right?

MR. LaLONE: Yes, Your Honor. Your Honor, our last motion here today as I understand it is entitled; "defendant's motion for summary judgment based upon the equitable defenses of laches".

And to assist us to quickly review this I have a display for the Court, if I may. Your Honor, I'm handing you a time line of events showing the extreme passing of time over a two or three year time delay in the plaintiffs filing suit against Crosswinds. Your Honor, I need to focus on one thing. This motion is brought under case number 03-74600; Michael A. Chirco, Dominic Moceri, versus Crosswinds Communities and Bernard Glieberman. And that motion, or that case was filed in November of last year. Now, one moment, please.

Preliminarily, laches, Your Honor, is not a mere matter of time or delay, but it's principally a question of equity, of permitting the claim not to be enforced. And we cited the Ford Motor case, 342, F.3d, F43, a Sixth-Circuit case in 2003. And we also cited the Silva McLean case, S-i-l-v-a, vs McLean, which supports our proposition that summary judgment in a situation where laches is concerned [87] is appropriate. So we are armed with the tools here to actually grant the relief requested by the defendants, which is, we believe in a subsequently filed case, the 2003 case, plaintiffs unreasonably delayed, to the defense's detriment who did, in fact, rely upon, and therefore the plaintiffs should not be able to enforce any of their rights, to the extent they have any, against these defendants.

So let's look at our time line on reasonable delay. We have handed up to you a time line of Chirco and Moceri reasonably delay including Crosswinds. Can we put Exhibit D on that? Is it possible for discussion purposes, Your Honor. Thank you.

(Defendant's Exhibit Letter "D" is marked for identification.)

MR. LaLONE: So Exhibit D will be a time line that we have prepared, just to point out to the Court the extent of delay in the plaintiff's in bringing this particular cause of action.

Now, the plaintiffs are going to say, well, they could have brought this cause of action previously. They could have done it on under a prior caption. Well, they didn't. And that's to their detriment. Had they done that clear back in, well, November 7th of 2001 when they amended their first complaint to add Progressive, I guess if they [88] would have done it back then, then Crosswinds would have known about this claim against them.

And you're also going to hear plaintiffs argue that these are all the same parties. It's much ado about nothing. It's a red herring. This motion of laches has no merit. Well, I encourage the Court to actually look at the caption of the parties in the two cases. We have different deps for Mr. Glieberman's in both, different properties, different companies building these projects, different companies selling these projects. The projects are named differently. They're in different counties. This is a different case, as evidenced by the fact that plaintiffs filed a separate motion. The problem is they waited over two years to file the present lawsuit.

So what are the facts. Initially I'd just like to -indicate that there was a Freedom of Information request that the defendants have been requesting. There is a motion about two weeks ago in front of Magistrate Morgan on motion to compel. To prep support arguments in this motion right here. Because we knew that when we initially filed this motion things weren't adding up, which we believe plaintiffs were withholding information from us. In fact, they were. In fact, just July 7th at the oral argument here in front of Magistrate Morgan we received just that morning, just about a half hour before we had submitted our [89] unresolved issues, we received for the first time in nearly six months of litigating this case, we received for the first time plaintiff's Freedom of Information request dated October 16th, 2001. And you'll see that in our time line right here, Your Honor. In fact, if you don't mind, I'd like to hand a copy of this.

THE COURT: Copy of the time line?

MR. LaLONE: No. A copy of the Freedom of Information request. Your Honor, this is new information we just received within the last couple of weeks pursuant to our motion to compel.

THE-COURT: Okay.

MR. LaLONE: So I didn't have a chance to give it to you before. So I apologize.

THE COURT: All right.

MR. LaLONE: I just gave a copy to Mr. Wasinger.

THE COURT: Okay.

MR. LaLONE: If I could refer to this as Exhibit E.

(Defendant's Exhibit Letter "E" is marked for identification.)

THE COURT: Just this one thing.

MR. LaLONE: Your Honor, the entire stack is the information we just received on July 7th by the plaintiffs pursuant to our motion to compel to get evidence as to when [90] plaintiffs first learned about Jonathan's Landing. That is the name of the project being accused of infringement in this new lawsuit here.

Okay. So we just received this bundle of information. We're going to mark it Exhibit E, bates number CRS 061 through CRS 145. I bring this to your attention because I identified bates numbers on this time line, Exhibit D, Your Honor, which become important here.

So after filing a motion to compel we actually received some very early and interesting information by the plaintiffs when they became aware of Jonathan's Landing.

Now, lets start from the right, work our way back. To the right is the actual filing of the complaint in this case at issue here. November 14th, 2003. You can see if you follow the time line across there were at least two years and one month delay before the plaintiffs actually filed this Freedom of Information request on October 16th, 2001. So we know conclusively, Your Honor, based upon their own documentations they just finally produced to us that they sat and waited over two years and one month. But it doesn't stop there, Your Honor.

If you look at the Freedom of Information request, CRS 063 and 064 they reference in their, prior documents in August of 2001 set of plans. That's in paragraph one there. In paragraph two, they reference a set of site plan [91] review report, dated 4/16/01. They reference a site plan review dated 4/10/01. So clearly long before October 16th, 2001 the plaintiffs knew about Jonathan's Landing and did nothing. In fact, as a result of our motion to compel and serving discovery, thanks to you granting us the discovery in this new case against Crosswinds we found additional information. Can I have that big binder of exhibits? Thanks.

Your Honor, I have in my hand a set of documents that were produced from plaintiff's files just recently as a result of our motion to compel. And they have bates numbers CRS one through CRS 060 It appears to be about sixty sheets of drawings here. These are all different drawings of the Jonathan's Landing project. They were on file with Howell Township that the plaintiffs retrieved through the Freedom of Information request or through some other means. I'm not sure. But they were sitting in their files.

Your Honor, these drawings are dated 4/10/01, things that are referenced in their Freedom of Information request. There's one here, August of 2001, a set of Jonathan's Landing documents. And interestingly, going clear back to January 26th, 2001, here is a stamped copy of a Jonathan's

Landing's utility rating plan showing an outline of the accused Heritage. Excuse me. Accused [92] Jonathan's Landing's plans. And this was in their files.

Now, we never get a straight answer from the plaintiffs as to when they first learned about Jonathan's Landing. They did give us a supplemental interrogatory answer, I believe, about a day ago. And they said, one of the responses, when they learned about it, at least by May of 2001 during the George Attard deposition; well, we know that they learned about it much prior, to that because we already have a 2001 letter to the township saying, send this information about Jonathan's Landing.

So with all that being said, it becomes increasingly clear to us that the plaintiffs have waited more than two years and one month to file suit after learning about Jonathan's Landing. And it could actually be up to, well, two years and seven months if you look at some of these other documents in their files.

Now, here's why this is relevant; let's just say they they've waited two years and a month before filing suit. If you look at our time line, Your Honor, right here on the left side, you will see that, you see this, a case, construction began on Heritage—I'm switching projects on you now.

Construction began on Heritage in December of 2000. Four months later the plaintiffs sued Charter Oaks and American Heritage for copyright infringement. That was [93] the first case filed with you here on April 1st, 2001. They made it four months the first time. The second time around they waited over two years. So the delay issue is pretty clear here. They waited. They waited. They waited. Now, if you look at the declaration of Mr. Glieberman, I believe we've attached that. Yes, it attaches as tab one to our- motion, Your Honor.

Mr. Glieberman set out in there about how he relied upon that delay; specifically—here we go. Paragraph eight of Mr.

Glieberman's March 31st, 2004 declaration. I'm sorry. Affidavit states, "Mr. Chirco and Mr. Moceri's eighteen months of inaction [prior to filing suit against the Jonathan Landing led me to believe that the project was not considered by Mr. Moceri and Mr. Chirco to be infringing-the-alleged copyrights. This belief is reasonable because plaintiff filed suit against me in and my company in Chirco versus Charter Oaks Home in April of 2001 which is only a few months after building, construction began on Heritage projects in December of 2000. Therefore, in the present case I relied on this plaintiff's inaction and continued to move forward with the Jonathan's Landing project knowing that plaintiffs would vigorously protect their rights if they felt that there was a possibility of infringement".

We submitted evidence here of the delay, Your [94] Honor. We submitted, and we used the plaintiff's own documentation. We submitted evidence through Mr. Glieberman's declaration that he relied upon that inaction. And he clearly has been, he acted upon his detriment in relying upon that.- I think the facts are quite elear on that. Plaintiff's opposition brief, Your Honor, is not responded to at this point. They do not respond to why they took so long. Why the delay. They try to blur the facts, confuse the Court that these are all the same case. They could have filed before but they didn't, for whatever reason. They're all the same defense, but when you look at the captions, they're not the same defendants. And if they were, why didn't they submit a claim for the second time. Well, they didn't because this is a different case.

Your Honor, I just submit to you that there's no Rule 56 evidence submitted by the plaintiffs in their motion papers rebutting these proofs. And we pray that you grant our motion. Thank you.

THE COURT: Okay.

MR. WASINGER: Your Honor, Mr. Glieberman's affidavit says a lot more about Mr. Glieberman's gullibility than it does about his reasonable reliance. These plans are identical. There is no way, shape or form that Mr. Glieberman could credibly say that he did not believe that Mr. Moceri and Mx. Chirco would not vigorously [95] protect their rights. The plans are identical. They are so identical that everyone has agreed that they're identical. They're prepared by Progressive.

So now let's go to what is the legally relevant question. The infringement in this particular case was not in our judgment of a magnitude that would warrant filing a lawsuit until there was actual construction begun. When you look at the materials that they have provided to you, we were aware that they were negotiating with the township about the possibility that they would build this project. All of these materials deal with preliminary—they are seeking preliminary approval.

As Your Honor knows, they can't begin constructing until they get final approval. And that final site plan approval as we now know and as reflected on their, on their deal was not—occurred—did not occur until shortly before May, 2002. Until there was approval by the appropriate municipalities this was nothing of any significance.

So now why didn't we join or start a separate lawsuit? If you look at the original complaint, it seeks to enjoin. And we know now a little bit more—let me back up. We know a little bit more now about who these various entities are than we did originally.

We knew that Mr. Gliebeman was behind, Mr. [96] Glieberman was behind American Heritage. .We knew that Mr. Glieberman, and came to know through his deposition, and Your Honor cited that in the October 3rd opinion, is really the sole shareholder of all these various subsidiary' organizations

and operates through Crosswinds. The original complaint sought to enjoin Mr. Glieberman and these-related entities that were named in the complaint for pursuing any infringement of these plans that focus specifically on Heritage. We did-find out in May of 2002 or thereabouts, or, excuse me, that-sometime in September of 2002 that Mr. Glieberman was pursuing the Jonathan's Landing's project. The copyright infringment occurs each time they build a building.

So the statute of limitations issue, from our perspective was a three-year limitations period. And therefore, we had until the expiration of the statute of limitations on the first construction to commence a lawsuit. Could we have done so earlier? Yes. Did we? Why didn't we do so earlier? There were essentially two reasons. The first had to do with the hope and expectation that when the Court resolved, when we had the motion decisions in this Court' and we all knew that motions were going to be filed and there were hotly contested issues about whether there was infringement, that we would be in a better position to know whether we had in this Court's mind [97] a good lawsuit or a bad lawsuit.

If we lost the summary judgment motion, obviously it wouldn't make much sense to start another lawsuit. If we won the summary judgment motion, candidly we were hoping that Mr. Glieberman might come to his senses and come to some sort of resolution.

For a lot of different reasons, that process took through October 10th, 2003. That's when you, when Your Honor issued her opinion. It became clear after Your Honor issued her opinion—let me backup, a second since they want to talk about our state of mind. Judge Roberts, the same thing happened in another case where these very same attorneys were representing a company that was called Selective Group. When the Selective Group cases were submitted to summary judgment motion, there was never going to be a settlement. There was never going to be an anything.

When Judge Roberts confirmed the Magistrate Judge's opinion' and found that there was a case of infringement, that case very quickly settled, no thanks to the attorneys in this room because 'they used their separate business attorneys to cause a settlement to occur. And that was with the Centex Corporation and Selective Group. So our hope was that if Mr. Glieberman saw that the claims were not frivolous and that the summary judgment was not [98] granted, what would happen in Mr. Glieberman's case would be what would happen in Judge Roberts' case.

When it became clear that that wasn't going to occur within a month we filed a separate complaint. Why didn't we file a motion to amend? Two reasons; first of all, this case has created the type of quibbling about details that would have certainly guaranteed a series of motions-in this Court about how Crosswinds isn't in theother case, they can't amend, they-couldn't amend, da-da-da-da, in an effort, hopefully, to avoid the kinds of additional briefing that would have been generated by a motion to amend.

We simply filed a filed a complaint against the then entity that we knew involved in Mr. Glieberman, recognizing as we stated on our cover sheet that they were, in our view, arising out of the same action. So what's why we filed a separate deal. There just hasn't been any laches. The normal rule is that if you exceed the statute of limitations you have laches. We have not even gotten close to the statute of limitations. We could have sued within three years after the first sale of a condominium and been within the limitations period. To argue that we don't have the benefit of the limitations period because of some prejudice to Mr. Glieberman when he is the same principle of all these entities when he knew the very same [99] plan-was at issue is just and absurd. Thank you.

THE COURT: Counsel, I am already tight on the tongue. Two minutes.

MR.LaLONE: Thank you. Your Honor, if you look at the opposition brief, I can't help but keep going back to the proofs. Rule 56 requires proofs in the record. And I'm looking at the plaintiff's opposition brief. And there are no attachments to it. It's five pages long. And they don't reference any affidavits, pleadings, interrogatories, document requests that they are relying upon to refute the facts that we have submitted that two years to file suit. They did not refute Mr. Glieberman's affidavit where he said he relied to his detriment and, in not bringing suit. You hear plenty of excuses why they didn't bring suit.

Your Honor, attorney arguments don't count. Pleadings, if you look at the facts, we believe you will agree with us that this laches defense applies. And by the way, laches is a separate defense. It's not dictated by the statute of limitations or under copyright law. They're two wholly separate things to consider. So, and by the way, we don't agree that the Jonathan's Landing and the Heritage plans are the same. In fact, I believe we cited testimony here by a witness. We actually put evidence on the record that they're not the same. I don't see any testimony or anything supporting Mr. Wasinger's cart [sic] [100] blanche statement that we all agreed they're the same. We don't, we don't agreement with that. We emphatically don't agree that they're the same. Thank you very much, Your Honor.

THE COURT: Okay. That takes care of everything?

MR. WASINGER: Yes, Your Honor.

THE COURT: Okay. I'll give you a written order. Thank you very much for your arguments. Do you have another matter? You were looking?

MR. CANTOR There were other motions and plaintiff's motion.

MR. WASINGER: Well, Your Honor, may I just clarify that? The plaintiffs motion is the flip side of the motion that you-heard yesterday. We're simply saying that, as a matter of law the building of the building doesn't, doesn't diminish. So we don't need to re-argue that or anything. It's just the flip side of the same motion.

THE COURT: Right. And there's-a motion for leave to file a summary judgment.

MR. WASINGER: The point-is it doesn't really matter. It's the same thing.

THE COURT: Do you dispute that? You don't need oral.

MR. CANTOR: There was one other item; that is, we [101] filed an objection which doesn't require a ruling on instantly but an objection to the attempt to switch from the cause of action of misrepresentation of origin to the different cause of action of trade dress violation. And that would be one of the points I would appreciate Your Honor addressing when you get to that.

MR. WASINGER: We haven't yet moved to amend. I've told you that we stand by our original. We believe we have an additional theory. I think that there's no reason to deal with that now. As of right now we're pursuing our original theory that Your Honor ruled on.

THE-COURT: Okay.

MR. CANTOR: Which is the original theory.

MR. WASINGER: The theory that is summarized in the Court's October 10th, 2003 opinion.

THE COURT: I think we've heard the argument about them changing the theory. And I think I can address it on the arguments that you've already made. Do you want to make additional arguments?

MR. CANTOR: No. I think the argument is made in connection with our motion.

THE COURT: Okay.

MR. CANTOR: For the Court's benefit, we don't regard this as merely a change in theory. This is a different kind of lawsuit. It's a different cause of [102] action. And we appreciate the Court considering our brief to look at it. There's two different actions. A trade dress case is not the same as a, what they call reverse. passing off case.

THE COURT: If you want to argue this I will let you argue it, but you cannot argue it now.

MR. WASINGER: I don't want to argue it. I've just said. it's moot because we have not yet sought to add.

THE COURT: I know your position that it's moot. His position is that I should take it up in the pleading. And I don't want to promise what I'm going to say in the pleading. All right. Which is to say that I may not in the pleading dismiss that cause of action that he hasn't even brought yet. All right. Okay.

MR. WASINGER: Thank you.

MR. LaLONE: Can I clarify the prior point? The plaintiffs filed a motion for summary judgment dismissing defendant's affirmative defense that construction of the Knollwood building turned the building design-over to public demand. Along with that was a motion for leave to file that motion because their motion was late. They beat the deadline you set by a court order. We oppose the motion for leave. That's not been argued. Nor do we need to argue that now. But I just want to point out we've never briefed their motion striking our affirmative [103] defense.

THE COURT: I understand that.

MR. LaLONE: Thank you.

THE COURT: I really did look at it.

MR. LaLONE: Okay.

THE COURT: All right.

MR. LaLONE: And I was waiting to respond to him if you thought they received permission for leave to file it. That was the only caveat.

THE COURT: Don't you want to respond to it in writing?

MR. LaLONE: But we'd like an order as to whether or not you're granting the motion for leave first.

THE COURT: Of course. But don't you want to respond in writing to their?

MR. LaLONE: Absolutely.

THE COURT: If I allow them to have it?

MR. LaLONE: Absolutely.

THE COURT: Maybe I misunderstood you. What are you wanting to do now?

MR. LaLONE: I just want to clarify. We did not respond.

THE COURT: I understand that you didn't respond. You're not required to respond because he doesn't have [104] relief to file it.

MR. LaLONE: Thank you.

THE COURT: Okay. All right. Anything else?

MR. CANTOR: Yes. One last comment. May I thank the Court on behalf of both parties for remarkable patience.

THE COURT: That's why, I'm here each day.

MR. CANTOR: Thank you.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed NOV. 14, 2003]

Case No. 03-74600
Hon. Anna Diggs Taylopr
Magistrate Judge Komives

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiffs,

v.

CROSSWINDS COMMUNITIES, INC.,
and BERNARD GLIEBERMAN,
Defendants.

Stephen Wasinger (P25963)
Attorney for Plaintiffs
26862 Woodward
Suite 100
Royal Oak, Michigan 48067
Phone: (248) 414-9942 or (248) 414-9900

Julie Greenberg
Co-Counsel For Plaintiffs
280 N. Woodward
Suite 400
Birmingham, MI 48009-ET42
Phone: (248) 647-6000

COMPLAINT AND JURY DEMAND

Plaintiffs Michael A. Chirco and. Dominic Moceri, by their attorneys, say:

NATURE OF THIS ACTION

1. This is an action under the copyright laws of the United States, 17 U.S.C. § 101, *et seq*., to prevent and restrain Defendants from infringing Plaintiffs' copyrights and for monetary relief pursuant to the Copyright Act as a result of Defendants' infringing activities.

JURISDICTION AND VENUE

2. This court has jurisdiction pursuant to 17 U.S.C. § 501(b), 28 U.S.C. §§ 1331 and 1338(a).

3. Venue in this district is proper pursuant to 28 U.S.C. §§ 1391 and 1400(a) because the Defendants reside in this district, because the acts giving rise to this case occurred in this district, and because the property which is the subject of this action is situated in this district.

PARTIES AND JURISDICTION

4. Plaintiff Chirco is a resident of Washington, Macomb County, Michigan.

5. Plaintiff Moceri is a resident of Grand Blanc, Genesee County, Michigan.

6. Defendant Crosswinds Communities Inc. ("Crosswinds") is a Michigan corporation with its principal place of business in Oakland County, Michigan.

7. Defendant Bernard Glieberman is a resident of Oakland County, Michigan. Glieberman is also an officer and principal shareholder of Crosswinds and its affiliated companies, and, on information and belief, he has directed Crosswinds and its affiliated companies to engage in the actions which are the subject of this complaint.

COMMON FACTUAL ALLEGATIONS

8. Plaintiffs are in the business of developing real estate, including condominiums, apartments and single family homes in the Detroit metropolitan area. Plaintiffs pursue the development, leasing and sale of the condominiums units in commerce, and their actions affect interstate commerce. By way of example, Plaintiffs advertise these homes, apartments and condominiums in newspapers which are distributed inter state, on television which is transmitted interstate, and through the World Wide Web on the Internet at www.moceri.com and Aberdeen.village.com and aberdeengarden.com.

9. Plaintiffs have developed, and are developing, successful original and architecturally unique condominium projects in Oakland County, and Macomb County, Michigan, including, without limitation, Aberdeen Gardens in Sterling Heights, Michigan; Glenmoor Village in Macomb Township, Michigan; Warwick Village in Macomb Township, Michigan; Terraces at Cobblestone in Macomb Township, Michigan; Aberdeen at Hartford in Macomb Township, Michigan; Aberdeen Pines in Sterling Heights, Michigan; Stratford Village in Sterling Heights, Michigan; Aberdeen Village in Shelby Township, Michigan; Oakmonte in Oakland Township, Michigan; and Oakmonte in Oakland Township, Michigan. These projects are collectively referred to herein as the "Aberdeen Projects."

10. As part of their efforts to develop original and architecturally unique condominiums projects, Plaintiffs worked with Ronald E. Mayotte & Associates ("Mayotte") to create architectural plans and architectural works, and they have constructed buildings in accordance with these architectural plans which incorporate the architectural works.

11. Included among these architectural plans and works are the protected plans and works embodied in the Aberdeen Village condominiums project which is located in Sterling Heights, Macomb County, Michigan. The architectural plans for Aberdeen Village are referred to as the "Aberdeen Plans." The architectural works for Aberdeen Village are referred to as the "Aberdeen Works."

12. The Aberdeen Plans and the Aberdeen Works are derived from copyrighted architectural plans for an apartment project in Macomb County commonly known as Manors at Knollwood (the "Knollwood Plans").

13. The Knollwood Plans, the Aberdeen Plans, and the Aberdeen Works are all the subject of valid, registered copyrights, and are collectively referred to herein as the

"Copyrighted Materials." Copies of the Certificates of Registration are attached hereto as Exhibit A.

14. Plaintiffs are the owners of all exclusive rights to the Copyrighted Materials pursuant to an exclusive license agreement with Mayotte.

15. Crosswinds is in the process of developing a condominium community in Howell Township, Livingston County, Michigan, commonly known as Jonathan's Landing ("Jonathan's Landing").

16. Crosswinds, through its affiliates (including Creative Land Design, Inc.), has filed plans and drawings describing the Jonathan's Landing project (the "Jonathan's Landing Plans") with Howell Township, and Crosswinds is currently constructing condominiums based on the Jonathan's Landing Plans.

17. The Jonathan's Landing Plans are substantially similar to plans which Crosswinds and Glieberman used to develop, market and sell condominiums located in Waterford Township, Oakland County, Michigan commonly known as the "Heritage Condominiums" (the "Heritage Development"). In an action presently pending in this district, No. 01-71403, plaintiffs are pursuing an action against Glieberman and entities controlled by Glieberman asserting that the plans for the Heritage condominiums infringe plaintiffs' Knollwood and Aberdeen copyrights.

18. As with the Heritage condominiums, the Jonathan's Landing condominiums are substantially similar to, and copy, the Knollwood Plans, the Aberdeen Plans and the Aberdeen Works.

19. If Defendants are not enjoined from continuing construction of the Heritage Development, Defendants will be allowed to unfairly compete with Plaintiffs.

20. If not enjoined, Defendants' activities, including their illegal use of the Copyrighted Materials, will cause Plaintiffs irreparable injury by, among other things, diminishing the goodwill which Plaintiffs have created by developing housing projects such as Aberdeen Gardens based on the Plans and by depriving Plaintiffs of sales and sales opportunities for housing and condominia units based on the Plans and Copyrighted Materials, and in general causing Plaintiffs to lose exclusive control of their Copyrighted Materials.

COUNT I:
Copyright Infringement

21. Plaintiffs reallege Paragraphs 1 through 20 above.

22. Defendants Crosswinds and Glieberman infringed Plaintiffs' copyright in their Copyrighted Materials by copying the Copyrighted Materials.

23. Unless enjoined by this Court, the infringing actions of Crosswinds and Glieberman will cause irreparable injury to Plaintiffs' business and to the goodwill Plaintiffs have established as a result of their construction of the various Aberdeen residential communities.

24. Plaintiffs are also entitled to recover monetary relief from Crosswinds and Glieberman, pursuant to Section 504 of the Copyright Act, 17 U.S.C. § 504(b), including all revenues which Crosswinds and Glieberman have received as a result of its infringing activities.

25. Pursuant to 17 U.S.C. § 505, Plaintiffs are also entitled to their reasonable costs and attorneys' fees.

COUNT II:
Vicarious Liability

26. Plaintiffs reallege Paragraphs 1 through 25 above.

27. Defendant Glieberman is vicariously liable for the infringing acts of Crosswinds and other entities affiliated with

Crosswinds who were also involved in the development of Jonathan's Landing and who, as a result, infringed Plaintiffs' copyrights. On information and belief, these other entities include Creative Land Design, Inc.

28. As a result, Glieberman is personally liable for copyright infringement.

COUNT III:
Contributory Liability

29. Plaintiffs reallege Paragraphs 1 through 28 above.

30. Defendant Glieberman is contributorily liable for the infringing acts of Crosswinds.

31. As a result, Glieberman is personally liable for copyright infringement.

WHEREFORE, Plaintiffs pray that this Court:

A. Enjoin, permanently and during the pendency of this action, Defendants and all persons associated with, or acting on behalf of, Defendants from engaging in any further acts of infringement including promoting, building, or continuing to build, selling or attempting to sell, leasing or attempting to lease, any condominiums, apartments or other housing units based on the Plans,

B. Order Defendants to return to Plaintiffs for impoundment and destruction all copies of the Plans or other Copyrighted Materials in Defendants' possession, custody or control or within the possession, custody or control of any persons associated with or acting on behalf of Defendants.

C. Order Defendants to destroy or have destroyed all architectural works which have been built using plans which infringe the Copyrighted Materials.

D. Order Defendants to account for all gains, profits, and advantages derived from its acts of infringement.

E. Enter a money judgment in favor of Plaintiffs for all damages to which they are entitled pursuant to Section 504 of the Copyright Act, 15 U.S.C. § 504.

F. Award Plaintiffs interest, costs and attorneys' fees pursuant to Section 505 of the Copyright Act, 15 U.S.C. § 505.

G. Grant any other relief which the Court deems just and appropriate.

JURY DEMAND

Plaintiffs demand a trial by jury on issues so triable.

WASINGER KICKHAM AND HANLEY

By: /s/ Stephen Wasinger
STEPHEN WASINGER (P-25963)
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, Michigan 48067
(248) 414-9900

GIFFORD, KRASS, GROH SPRINKLE, ANDERSON & CITKOWSKI

DOUGLAS SPRINKLE
JULIE GREENBERG
280 N. Woodward, Suite 400
Birmingham, MI 48009-5392
(248) 647-6000
Co-counsel For Plaintiffs

Dated: November 14, 2003

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 03-74600
Honorable Anna Diggs Taylor
Magistrate Judge Komives

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiffs,

-vs-

CROSSWINDS COMMUNITIES, INC. and
BERNARD GLIEBERMAN,
Defendants.

AFFIDAVIT OF BERNARD GLIEBERMAN

1. I am the President of Crosswinds Communities, Inc. My work address is 41050 Vincenti CL, Novi, MI 48375.

2. I am an Officer of record for the building of residential condominiums for Crosswinds West Corporation. Crosswinds West Corporation owns the project near M-59 and Grand River, in Howell, Michigan, known as Jonathan's Landing. Ground breaking on this project began on May, 2002.

3. Exhibit A contains a copy of the front page of the original site plan that was submitted to the Livingston County Drain Commission on December 7, 2001. These plans were approved on January 8, 2001. A review of the footprint of these publicly available documents shows that as early as January 8, 2001 it was clear that Jonathan's Landing would contain buildings having a twelve-plex design.

4. Exhibit B contains deposition testimony from my deposition on September 26, 2002 which I now reaffirm as being true and correct statements regarding the Jonathan's Landing development.

5. At present time, the Jonathan's Landing development has 192 Units under construction and/or construction has been completed.

6. As of November 14, 2003 (the date this lawsuit was filed) 168 units had been erected. Of which 109 of the units were occupied and 141 of the units were sold.

7. Crosswinds Communities, Inc. has suffered severe prejudice that will continue if Mr. Chirco and Mr. Moceri are permitted to maintain this lawsuit against the Jonathan's Landing Development. I believe Plaintiffs' were aware of the Jonathan's Landing Project as early as 2002, but they waited until November 14, 2003 to sue me and Crosswinds Communities, Inc.

8. Mr. Chirco and Mr. Moceri's eighteen months of inaction prior to filing suit against the Jonathan's Landing led me to believe that the project was not considered by Mr. Moceri and Mr. Chirco to be infringing the alleged copyrights. This belief is reasonable because Plaintiffs filed suit against me and my company in *Chirco v. Charter Oak Homes, Inc.* (case No 01-71403) in April of 2001, which was only a few months after building construction began on the Heritage project in December of 2000. Therefore, in the present case I relied on this Plaintiffs inaction and continued to move forward with the Jonathan's Landing project knowing that Plaintiffs would vigorously protect their rights if they felt that there was a possibility of infringment Allowing this case to continue will be detrimental to me and my company

9. I have not, and did not copy the Aberdeen Village, Knollwood Aberdeen Pines, or Aberdeen Gardens, copyrighted construction documents. I did not instruct anyone to

do so. I have never, nor have I ever instructed anyone, to obtain copies of the Aberdeen Village, Knollwood, or other plans by Plaintiffs or Ronald Mayotte. I have never completed any FOIA requests, nor instructed anyone, to do so in order obtain Plaintiff's plan. I have never had access to the Aberdeen Village or Knollwood construction drawings that has been copyrighted and asserted in this case.

10. I hereby declare under penalty of perjury that all statements made herein are truthful to the best of my knowledge and belief, and further, these statements were made with the knowledge that willful false statements and alike so made are punishable by fine or imprisonment, or both, under § 1001 of Title 18 of the United States Code.

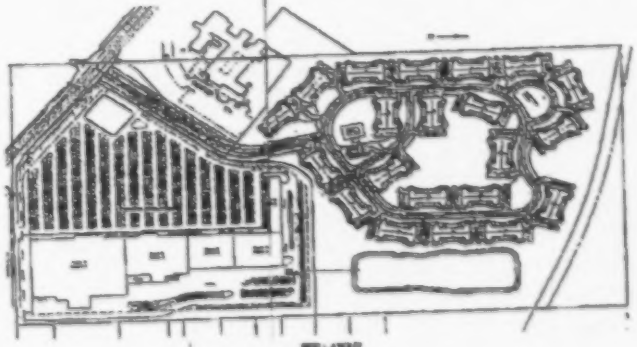
By: /s/ Bernard Glieberman
BERNARD GLIEBERRNAN, President of
Crosswinds Communities, Inc.

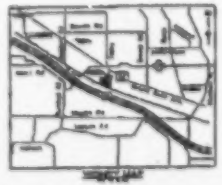
Dated: 03/31/04

APPENDIX H

JONATHAN'S LANDING

MULTI-FAMILY CONDOMINIUM DEVELOPMENT
HOWELL TOWNSHIP, LIVINGSTON COUNTY, MICHIGAN
CONSTRUCTION PLANS





ATWELL-HICKS, INC.

BEST AVAILABLE COPY

SITE PLAN REVIEW
HOWELL TOWNSHIP

DATE 04/10/01
FILE # 04.01.01
PARCEL ID # 4706-28-400-011 / 005
4706-27-300-013

APPLICANT: Creative Land Design, Inc. / Jonathan's Landing
CONTACT NAME: Susan Rothstein
PHONE: 248 615-1313 FAX: 248 426-5646
PROPERTY ADDRESS: Southeast corner of Grand River / M-59

PAID SITE PLAN REVIEW $500.00 paid 4/19/01 chk 25327
ENGINEERING REVIEW Will pay upon billing.

Planner Report /4/19/01
Spicer Engineering / 4/24/01

Planning Commission Action 4/24/01:
MOTION by Knight, seconded by Blough, "TO GRANT PRELIMINARY APPROVAL FOR JONATHAN'S LANDING / CREATIVE LAND DESIGN, INC., FILE #04.01.01 PARCEL ID# 4706-28-400-011 / 005 AND 4706-27-300-013, LV1201-1-1 JOB #1570, SITE PLAN REVIEW, WITH THE FOLLOWING ITEMS STILL OUTSTANDING: 1) DRAIN COMMISSIONERS APPROVAL 2) MICHIGAN DEPARTMENT OF TRANSPORTATION REVIEW AND APPROVAL 3) PLANNER REPORT DATED APRIL 16, 2001 ITEMS, 3,4,7,8,9,10,20,23,24 AND 25 4) SPICER REPORTS DATED MARCH 23, 2001 AND APRIL 24, 2001 5) FIRE MARSHALL REVIEW OF SITE 6) MASTER DEED SUBMITTED TO THE TOWNSHIP."
Discussion followed. Motion carried.
Sent minutes 5/17/01.

New Plans 6/19/01 and 7/23/01
Spicer and Planner mailed August 2, 2001

Planning Commission Action 9/11/01: Meeting cancelled

spr 040101

CRS-069

APPENDIX J

LAW OFFICES
WASINGER KICKHAM AND HANLEY
100 BEACON CENTRE
26862 WOODWARD AVENUE
ROYAL OAK, MICHIGAN 48067-0938
(248) 414-9900
FAX: (248) 41.4-9906

DEBORAH M. PAGE
(248)414-9101
Dpage@wkklaw.com

October 16, 2001

Merry E. Bering, Manager
Carolyn J. Eaton, Deputy Zoning Administrator
Charter Township of Howell
3525 Byron Road
Howell Township, Michigan 48843

VIA FACISIMILE [sic] & CERTIFIED MAIL

Re: *Jonathon's Landing*
Freedom of Information Act Request

Dear Ms. Bering and Ms. Eaton:

This letter is a written request for documents pursuant to the Michigan Freedom of Information Act ("FOIA"). Please provide us with copies of the following documents in connection with the development known as Jonathon's Landing. Jonathon's Landing is a 252-unit development to be located East of M-59 and Southwest of Grand River Avenue. *Our purpose for this request is to obtain a copy of the complete file, which should include, but is not limited to the following*:

1. Copies of any proposed site-plans, engineering plans, landscaping plans, elevation drawings, architecture plans or any other plans presented to the Township

in any manor [sic] or form, including a copy of the most recently proposed drawings prepared by Atwell Hicks, stamped and dated received from the Township in August of 2001, and the original plans by Progressive Associates (PA).

2. Copy of the Application for Site-Plan Review and any attachments thereto.
3. Copies of any minutes of department meetings or Site Plan Review Reports including the Site Plan Review Report dated 4/16/01 and the Site Plan Review dated 04/10/01.
4. Copies of any correspondence between the Township (any department) and the developer (Crosswinds Communities), or between any other regulatory authority and the developer, or the Township.
5. Copies of any other documents in the file, including, memos, notes, correspondence, consent judgments, PUDs, ownership records, comparison documents, sketches, drawings, roof construction drawings, etc. . .

FOIA requires that a public body receiving an FOIA request respond within five (5) days. *See* MCL 15.235.

Please let me know if you require payment for copies in advance of the preparation of these copies.

Thank you. If you should have any questions, don't hesitate to call.

Very truly yours,
/s/ Deborah M. Page
DEBORAH M. PAGE
Senior Real Estate Legal Assistant

cc: Dominic J. Moceri
Steve Wasinger
Edward R Kickham
Julie Greenberg

APPENDIX K

HOWELL TOWNSHIP
3525 Byron Road, Howell,
Michigan 48843
(517) 546-2817
Fax (517) 546-1483

October 22, 2001

Ms. Deborah Page
Wasinger Kickham and Hanley
100 Beacon Centre
26862 Woodward Avenue
Royal Oak MI 48067-0958

RE: Freedom of Information Request dated October 16, 2001

Dear Ms Page:

Your freedom of information request received by fax October 16, 2001 is hereby granted. Enclosed you will find a copy of the complete file regarding Jonathon's Landing.

Charges associated with your request are as follows:

110 pages © 25 cents per copy	$27.50
1 hour clerical © $9.47 per hour	9.47
Postage (2 envelopes)	12.90
TOTAL DUE HOWELL TOWNSHIP	$49.87

I believe this fulfills your request. Please make check payable to Howell Township in the amount of $49.87.

Sincerely,
/s/ Jane Cartwright
JANE CARTWRIGHT
Howell Township Clerk and
Freedom of Information Coordinator

Enclosure

APPENDIX L

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 01-72015
Hon. Victoria A. Roberts

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Plaintiffs,

vs.

HAMPTON RIDGE, L.L.C., SELECTIVE-DELAWARE, L.L.C., CENTEX HOMES REALTY, INC., PROGRESSIVE ASSOCIATES, INC., DANIEL A. TOSCH, and MICHAEL P. HOROWITZ,
Defendants.

Thursday, May 9, 2002

---

[4] EXAMINATION BY MR. WASINGER:

Q. State your name, sir?

A. George Attard, Junior.

Q. Have you been deposed before, Mr. Attard?

A. Yes, I have.

Q. when were you last deposed?

A. I don't recall the exact date.

Q. How many years ago?

A. I want to say maybe four or five.

Q. What was the occasion?

A. Dispute between a client of ours and one of their contractors.

Q. What was the nature of the dispute?

A. It regarded the supply of plumbing fixtures to a project that was built.

Q. Have you reviewed the complaint in this case? Do you know there's a complaint, do you know why you're here?

A. I do know there's a complaint, yes.

[5] Q. Do you know what it's about?

A. I do.

Q. what is it about as you understand it?

A. It's a case involving copyright infringement.

Q. Have you ever been deposed in a prior copyright case?

A. No, I have not.

Q. Were you involved in the case that Progressive was a defendant involving a house in Birmingham, copyright case?

A. No, I was not deposed.

Q. You're aware of that case?

A. I am.

Q. Mr. Cantor was involved in that case, was he? Do you know that?

A. This Mr. Cantor? -

Q. Yes.

A. I don't know.

Q. Let me ask you you're a registered architect, I take it?

A. That is correct.

Q. State of Michigan?

A. That is correct.

Q. When did you, when were you registered?

A. I believe it was in 1978.

Q. where did you go, where did you study architecture?

A. Lawrence Institute of Technology in Southfield, Michigan.

Q. What degree did you receive?

A. Bachelor of science.

Q. And have you, how long have you worked at Progressive?

A. Approximately 20 years plus.

Q. You're now a vice president?

A. That's correct.

Q. Do you have an ownership interest in Progressive?

A. I do not.

Q. Who's the owner of Progressive? who are the shareholders or whatever as you understand it?

A. The owner that I understand?

Q. Yes.

A. Is Daniel Anthony Tosch.

Q. He owns all the shares as you understand it?

A. To my understanding, that's correct.

Q. Prior to—so you joined Progressive 20 odd years ago; is that right?

[7] A. That's correct.

Q. Prior to joining Progressive, where were you employed?

A. I was employed at the unistrut Corporation in Wayne, Michigan.

Q. What were you doing there?

A. I was what's termed an architecture and representative for the corporation.

Q. You were selling the product; is that what you were doing?

A. I was a technical representative, I wasn't a salesperson.

Q. You would deal with customers and assist them in technical problems relating to the products Unistrut was selling?

A. That's correct.

Q. How long did you have that job?

A. Approximately four and a half years.

Q. Have you had other architectural, I mean jobs where you functioned as a design architect other than at Progressive?

A. I did work for Lewis G. Redstone & Associates for approximately a year and a half.

Q. What were you doing with Lewis G. Redstone?

A. I was a job captain.

[8] Q. So now the particular lawsuit that we're here for today involves a project for selective Group that has sometimes been known as Hampton Ridge. You know that project; do you not?

A. I do.

Q. It's in Genoa Township?

A. That is correct.

Q. Did you sign the drawings that were submitted to Genoa Township on that project?

A. I did not.

Q. Who did?

A. Daniel Anthony Tosch.

Q. You were actively involved, however, in providing architectural services to Selective for that project; is that right?

A. That is correct.

Q. When do you first have some recollection of being asked to provide work for selective Group on the Genoa Township project?

A. I don't remember the exact dates. I think it would be late winter or early spring of 2000.

Q. So if we used other designations, it would be in the first quarter do you think of 2000?

A. I'm not sure.

Q. All right. At that time, let me back up a [9] second. There's also a project for which Selective has provided—excuse me. Start all over. There's also a project for which Progressive has provided architectural services to Selective which is known as the Chatterton project down in Canton Township. You're familiar with that; are you not?

A. I am.

Q. And I take it you have provided architectural services on that project as well?

A. We have.

Q- You individually have as well?

A. I have.

Q. Did chatterton come first or did Genoa Township come first in terms of your involvement?

A. Chatterton and Canton Township was the original contact made.

Q. Okay. The project in Genoa Township also used the name Fox Run, did it not, for some period of time? Let me start over. The project in Genoa Township also had the name Fox Run at least for some period of time; is that right?

A. That is correct.

Q. With respect to the first communication with Selective Group relating to either the Genoa Township condominium or the Canton Township [10] condominium, who did you first deal with from Selective Group?

A. Mr. Steve Friedman.

Q. Did he call you or did you call him?

A. I believe he called Progressive Associates.

Q. Were you that person who returned his call?

A. Yes.

Q. What, did Mr. Friedman indicate why he was calling?

A. Yes.

Q. What did he indicate was the reason he was calling?

A. He was interested in discussing the possibility of Progressive Associates providing architectural services for the Selective Group.

Q. Did he describe any particular services that might be sought?

A. This is during our phone conversation?

Q. Yes.

A. No.

Q. The purpose of the conversation I take it was to set up some sort of meeting?

A. That is correct.

Q. And did you attend a meeting with Mr. Friedman?

[11] A. Yes, I did.

Q. Who besides yourself and Mr. Friedman attended the meeting?

A. My recollection is no one.

Q. So it was the two of you?

A. That is correct.

Q. Are you familiar with a gentleman by the name of Glen Cantor?

A. Yes, I am.

Q. When did you first meet with Mr. Cantor?

A. Probably the—I'm sorry.

Q. No, I apologize. I interrupted you which is a very bad thing to do. I apologize for that. So I'll repeat the question. When did you first meet with Mr. Glen Cantor?

A. It was probably the second or third time met with the selective people.

Q. And so let's go back to the first meeting. It was with you and Mr. Friedman; is that correct?

A. That is correct.

Q. Is that meeting the first substantive discussion that you had with Mr. Friedman? I mean by substantive where you actually talked about the scope of services as opposed to setting up the meeting?

A. Yes.

[12] Q. So we had a phone call, then we had a meeting?

A. That is correct.

Q. What occurred at that first meeting?

A. Mr. Friedman gave me a brief idea of the scope of what they were looking for and asked if we would be interested in possibly providing services to their company.

Q. What, did he define as the scope of what they might be looking for?

A. It was a multi-family project located in Canton Township.

Q. Did he give you any greater detail about what services you might provide for that project?

A. Yes.

Q. What did he tell you?

A. It would be design services and construction documents possibly.

Q. Did he describe for you the type of buildings that they might wish to create on that site?

A. Yes.

Q. What types of buildings did he indicate they might want to create on that site?

A. At that time I believe it was a combination of some single-family or duplex type condominiums in [13] one area and multi-family apartments and/or condominiums in the other areas of the site.

Q. Did he bring with him any documents that gave you any sense of the scope of the project? We're talking the first meeting.

A. I believe not.

Q. Did he have any conceptual drawings that would reflect the kinds of buildings they might be looking at or looking for?

A. To my recollection, no.

Q. How long did this meeting last?

A. It was brief. I would say less than a half an hour.

Q. Where did this meeting occur?

A. At the Selective offices.

Q. Did he describe to you the state of the project?

A. I'm not sure what you mean by the state.

Q. Well, did you have the impression that you were the first people to be talking to him about this or had work already been done with other designers and architects and planners?

A. He explained that some work had been done by another architect.

Q. Did he identify the other architect?

[14] A. He did.

Q. who did he identify?

A. I'm not sure of the full name, but it's Bogaerts.

Q. Did he explain why he was interested in having you rather than Bogaerts provide services?

A. He did.

Q. What did he say?

A. Apparently Bogaerts had a problem with some conflict of interest with some of his other clients.

Q. Did he identify who that, who was the other client?

A. I believe he did.

Q. Who did he identify?

A. My recollection is that it was Sing.

Q. Did he suggest to you why there was a conflict between sing and why Bogaerts working for selective would create a conflict?

A. He did not get in to detail.

Q. Did he give you any indication of what type of buildings had been designed at that point by Bogaerts?

A. I believe he mentioned ten and twelve-unit buildings is what and various sizes of buildings.

Q. I want to show you some documents that have [15] been previously marked in an earlier deposition as well. This one in particular is Exhibit 85. This is a Bogaerts' drawing that references a Chatterton building. Have you seen that drawing whether in that form or some other form, that elevation?

A. I believe I have.

Q. Did you see that at your first meeting?

A. I don't believe so.

Q. Did you see any conceptual drawings of that sort at your first meeting?

A. I recollect—to my recollection, no.

Q. I want to now show you another document that has been marked as Exhibit 84, and this is a site plan for the chatterton project. I would submit to you that was created by Bogaerts & Associates. Have you seen that site plan before?

A. I don't recall having seen this site plan.

Q. Do you know whether there were any site plans presented to you at this first meeting?

A. I don't believe so.

Q. Did Mr. Friedman, either in the phone conversation or the first meeting, indicate to you how he had come to call Progressive?

A. Yes.

Q. What did he indicate?

[16] A. We were referred to him by Mr. Bogaerts.

Q. And did he indicate why Mr. Bogaerts referred him to you?

A. No.

Q. Had you worked with Selective prior to this meeting with Mr. Friedman?

A. Yes.

Q. And in what context had you worked with selective prior to this meeting with Mr. Friedman?

A. Selective was a partner with another group on a project that we had done in Genoa Township named The Glens of Rolling Ridge.

Q. And that was National Lumber was the other partner in that project?

A. I believe that's correct.

Q. Did you work on that project?

A. I did.

Q. Who did you deal with at National Lumber?

A. I believe it was Allen Strickstein.

Q. Anyone else?

A. And it may have been to a lesser extent Dave Bitker.

Q. And did the selective people have an active involvement in The Glens of Rolling Ridge project?

A. Not by my estimation.

[17] Q. Had you worked with Mr. Strickstein or National Lumber prior to The Glens of Rolling Ridge project?

A. I believe not.

Q. Now, at this first meeting with Mr. Friedman, did he describe to you anything more about the buildings that they proposed to construct at Chatterton other than they might be ten or twelve-unit buildings?

A. No.

Q. Was there any discussion about whether they would be townhouse type buildings or stacked ranch type condos or things of that sort?

A. I don't recall any specific discussions at the first meeting.

Q. How did the first meeting conclude?

A. Mr. Friedman was going to send me or call me with a project program of what they would be looking for.

Q. Did he do that?

A. Yes. I believe he did.

Q. Was that in writing?

A. I don't recall.

Q. What did he tell you the project program was?

[18] A. They were looking at a ten-unit type building of various unit mixes because the project would contain both condominium and apartment type dwellings.

Q. Did you understand at that time that there would also be single-family homes in that Chatterton development?

A. I understood that there would be single-family condominium or duplexes, they weren't finalized as to what that would be.

Q. But well, anyway, so he indicated that there would be this mix of units, that would be, basically the core unit would be a ten-unit building; is that right?

A. He wasn't sure, but yes.

Q. What else did he describe about the project?

A. It would be a moderate to upper scale type apartments and condominiums for that particular area of canton and I think that was it.

Q. Was there any discussion, was part of the discussion of the project program about the type of densities that they would expect?

A. I believe there was.

Q. What were they talking about or what did he [19] tell you about that?

A. I don't recall.

Q. Did he give you any indication at that time that they had already made applications to the Canton Township with respect to that development?

A. I believe he did mention that they had preliminarily had some meetings with Canton Township regarding a site plan.

Q. Did he give you any indication as to the outcome of those discussions or the stage of those discussions at that point?

A. Yes.

Q. What did he tell you?

A. It seems that the discussions were favorable.

Q. Was there any indication to you that Canton Township, in fact, had turned down their initial application?

A. I don't recall.

Q. Now, was there anything else discussed? Let me back up a second. We have the meeting with Mr. Friedman and yourself, then there was this discussion of a project program. Do you think that was on the phone or at a meeting?

A. I don't recall.

[20] Q. Was there anything else discussed about the project program in that time frame of the initial discussions with Mr. Friedman?

A. Not that I can recall.

Q. Who, when do you next recall meeting with someone from selective?

A. Probably a week or two after our initial meeting.

Q. Where did that meeting occur?

A. I believe that was at selective.

Q. Who attended the second meeting?

A. Steve Friedman and myself.

Q. What occurred at the second meeting?

A. I think we discussed more of the program of what they were looking for, apparently Selective had decided that they were interested in obtaining Progressive Associates' services and we discussed briefly how our fee would be established for the preliminary design services.

Q. What next did you discuss?

A. Probably some of the specifics of what they were looking for.

Q. What were they looking for?

A. A concept of ten units, some of which may have direct access to the garages, not necessarily all [21] of them, of various unit sizes, one bedroom, two bedroom, three bedroom. Possibly some townhouses, possibly stacked flats.

Q. At that point did he show you any of the work that had been done by Bogaerts?

A. I think that may have been the first time that I saw the elevation and also a hand sketch done by Bogaerts.

Q. A hand sketch you mean of the building that is reflected, this ten-unit building that's reflected as Exhibit 85?

A. Yes.

Q. Did you, when you say a hand sketch, an elevation hand sketch, layout hand sketch, or floor plan hand sketch? what was it?

A. It was a plan.

Q. So it had the floor plan basically?

A. It was a single line, I wouldn't call it a floor plan.

Q. Did you understand at that point that they had any preference with respect to where the garages would be located in the, in these buildings?

A. Yes. It seems that the garages wanted to be located on the ends.

Q. Did they give any explanation for why they [22] preferred the garages be located there?

A. I think my recollection was in the Bogaert, their workings with Bogaerts, they had already done some work in developing a plan where the garages were accessed from the ends.

Q. If we look at the—let me ask you to look again at the Bogaerts' site plan that's dated March, stamped March 25, '99 which is Exhibit 84. Did you see a site plan of this type or a different type of site plan at that point?

A. I believe it was a different site plan.

Q. And the site plan you saw you thought had the garages on the ends; is that right?

A. That is correct.

Q. Now, let me show you by the way what has been marked as Exhibit 3. This is a smaller version think of the large document, the large Bogaerts' document that we marked as Exhibit 85. Have you seen in this scale or this is the Bogaerts' ten-unit?

A. I have not seen it in mono color.

Q. Let me show you—just a. second. I'm going to show you a document that has been previously marked in Mr. Tosch's deposition as Exhibit 20. Have you seen that before?

A. Yes.

[23] Q. And is that your handwriting?

A. That is correct.

Q. That is a memo that apparently is from you to Chip Ironside; is that right?

A. That is correct.

Q. What is the date on that document? Is that your handwriting as well?

A. It appears to be.

Q. April 7, 2000?

A. That's correct.

Q. Do you believe that this drawing was a document that you got from Progressive or is that a document that you have created—excuse me. That was a stupid question. You indicated that I'll—during your second meeting with Mr.

Friedman, do you believe that he showed you any site plan type documents?

A. I don't recall whether it was the second meeting or not, but it could have been.

Q. At some point you did?

A. Uh-huh.

Q. The document that I've marked there as Exhibit 20 is a site plan; is it not?

A. It's a partial of a site plan, correct.

Q. That was for the Chatterton project; is it not?

[24] A. I believe that's true.

Q. I think if we look at the roads—I can't see them on here. Okay. Did you prepare that site plan?

A. I don't recall whether I did or not. This is an electronic plan.

Q. What's that mean? You mean it was drawn on a computer?

A. Correct.

Q. I want to show you another document which was marked Exhibit 57, and the reason -- well, this is on a -- well, you can tell me. What is Exhibit 57?

A. Exhibit 57 is a site plan for the Chatterton apartment homes.

Q. Did you prepare that?

A. Me personally?

Q. Yes.

A. I believe not.

Q. Who do you believe prepared that? First of all, do you agree it was prepared by Progressive?

A. I don't know that for a fact.

Q. Would you agree that is on Progress—that Progressive drew it at least?

A. I don't know that for a fact.

Q. Is that a Progressive project [25] identification in the lower right-hand corner?

A. This is the type of identification we use, correct.

Q. And the project is the, this is your project number; is it not? Where is it down there? Can't see it.

A. Project number is missing.

Q. It has—do you see who has drawn CI? Do you see that? It's hard to read, I understand that.

A. It looks like it could be CI, yes.

Q. That would be Chip or Charles Ironside?

A. That's correct.

Q. It indicates checked PA. Do you know who PA might be?

A. Yes.

Q. who would that be?

A. Progressive Associates.

Q. Now, this, help me out on this because if you look at the date, it's April 5, 2000, and then it has some later dates up at the—what does that April 5, 2000 date indicate?

A. That would probably be the first time that the plan was actually issued to someone perhaps or when they first prepared the plan.

Q. Then we have these other dates. What would [26] those other dates indicate?

A. It indicates one would be, was issued for review and the other was issued after a revision.

Q. So we know only that this is a revised plan; is that right?

A. We know that this plan is a revised plan.

Q. Do you know whether the starting place was the kind of, I guess for lack of a better word, diagram or sketch that has been marked as Exhibit 20?

A. Could you restate that question, please?

Q. Do you believe that that, that the plan that is reflected on Exhibit 20 was the first site plan that you worked with for the Chatterton project?

A. I don't know that.

Q. Would you agree with me that by at least April of 2000 you were working on the Chatterton project?

A. Yes.

Q. If we use the April of 2000 date and back up. How many weeks do you think before April of 2000 did you receive the call from Mr. Friedman?

A. The original call?

Q. Yes, sir.

A. I don't know. I'd be speculating or guessing.

[27] Q Well, we know that the first time you received some written or materials from Mr. Friedman was at the second meeting; is that right?

A. I believe so.

Q. And the second meeting was what, a couple of weeks after the first meeting?

A. I believe so.

Q. And the first meeting was a few days or weeks after the phone call?

A. Something of that effect.

Q. So do you think the first phone call was at least a month before April?

A. Yes.

Q. Now, at the time that you had the second meeting with Mr. Friedman, was there a discussion about having garages—well, let me back up a second. If we look at Exhibit 20, the building depicted in unit 20 is what would be a ten-unit building; is that correct?

A. I believe that's correct.

Q. There would be four ranch units on the first floor, four on the second floor, and then the middle unit is a townhouse, is that right, or—

A. A townhouse or stacked flat.

Q. Okay. And there are ten garages in a kind [28] of not straight line. How would you describe the layout of these garages on the ends of the building? I mean I would say kind of laddered or something. What word would you use so we can communicate using the same words?

A. Offset.

Q. Offset. Okay, was that the design that Mr. Bogaerts had or is that different than Mr. Bogaerts' design, these offset garages?

A. I believe that was different.

Q. Who came up with the idea for these offset garages?

A. Progressive Associates.

Q. Who within Progressive?

A. Myself.

Q. Why?

A. It's a function of how the plan started to lay out.

Q. What do you mean how the plan started to lay out?

A. How the units would have gone together and the size of the units.

Q. Well, I guess my first question in Mr. Bogaerts, did you ever actually discuss with Mr. Bogaerts his plan?

[29] A. No, I did not.

Q. Did Mr. Bogaerts' plan have a townhouse unit in the middle?

A. I don't recall.

Q. Did you ever actually, did Mr. Friedman indicate to you that he was happy or discontent with the Bogaerts' drawing?

A. They were pleased with the elevation, they liked the concept of the very traditional elevations. He made that clear to me.

Q. Was there anything he didn't like about the Bogaert proposed or conceptual drawing?

A. This particular drawing?

Q. Yes.

A. Not to my recollection.

Q. So why didn't you just reproduce that drawing for him? Why change it?

A. We don't reproduce other people's drawings to begin with.

Q. My question is differently. Why didn't you reproduce this building?

A. Why did we?

Q. Did you reproduce this building basically?

A. No.

Q. Why did you, what changes were made and why [30] were they made in your first concept of a ten unit building?

A. We made, we made our preliminary plans based on the program and the requirements that Mr. Friedman laid out to me.

Q. Did Mr. Friedman come up with the idea of the offset garages?

A. No.

Q. Why did the offset garages fit Mr. Friedman's program plan?

A. At the onset, the particulars about the garages other than being on the end were not a dictated item.

Q. But the garages being on the end was a dictated item?

A. Yes.

MR. HEALY: When you say dictated, by who?

THE WITNESS: Our client.

Q. Mr. Friedman wanted the garages on the end?

A. Yes.

Q. Did Mr. Friedman care whether there was this townhouse in the middle or was that something you came up with?

A. Seems that they were open to suggestions on [31] how we achieved the ten units, whether it was a townhouse or flats.

Q. Now, at some point the design changed from this ten-unit design to a twelve-unit design; is that correct?

A. That is correct.

Q. And when did that occur?

A. I don't remember the exact dates or the approximate dates, but as we were moving along in the process.

Q. What occasioned the change from the ten-unit design to the twelve-unit design?

A. Excuse me?

Q. What was the occasion for the change? what caused the change?

A. Well, I think what caused the change was the request of our client.

Q. What specifically, well, let me—who was that person that requested the change?

A. That would have been Steve Friedman and/or Glen Cantor.

Q. So at some point Mr. Cantor became more involved in the process?

A. That's correct.

Q. Do you recall whether it was Mr. Friedman [32] or it was Mr. Cantor?

A. I don't recall exactly which one.

Q. Did they both come to meetings together?

A. Yes.

Q. If we look at the site plan which is Exhibit 57, it appears and I think that we have a review date of June 20th, then a revised October 9th.

A. Uh-huh.

Q. If we look at the far right side of Exhibit 57 as viewed from your perspective, those are single-family homes; is that right?

A. From my perspective, this is the right.

Q. I'm sorry. From your perspective the left side. I apologize. Those, did you understand those to be single-family homes?

A. I understood those to be single-family dwellings.

Q. And were you responsible, you being Progressive Associates at all responsible for the design of those single-family dwellings?

A. To my recollection, no.

Q. Who did you understand was responsible for the design of the single-family dwellings on the left side of Exhibit 57?

A. I don't recall.

[33] Q. Now, if we look at the middle of Exhibit 57, there are now what appear to be six garages on the ends of those buildings; is that right?

A. That is correct.

Q. And we now have what appear to be from the site plan four units on the first floor; is that correct?

A. That's what it appears to be, yes.

Q. Then if we go over to that section on the farthest right, those are still ten units; are they not.

A. It appears so.

Q. Now, did you understand that the condominia were to be in the middle of this site plan, the apartments on the side, I guess that's the east side closest to Beck Road?

A. Yes.

Q. Were you responsible at, at the time of your initial meetings with Mr. Friedman and later with Mr. Friedman and Cantor, were you to be designing both the apartments and the condominia?

A. My understanding at the time was that we would.

Q. Now, what explanation was given by the Selective representative for why they wanted to go [34] from a ten-unit building to a twelve-unit building?

A. That was their decision I believe based on their studies and internal marketing analyses and things of that nature.

Q. Did they-give any specific explanation for why they, why those studies and marketing analyses concluded that they wanted to have twelve units rather than ten units?

A. I don't recall.

Q. If we look at the twelve-unit condominia in the middle of the site plan which has been marked as Exhibit 57, it appears now that we have a straight line series of garages; is that correct?

A. That's correct.

Q. Is there a reason why they, did they give you an explanation for why they did not prefer the design that had

the ladder of garages, for lack of a better word, as reflected on Exhibit 20?

A. For functional reasons, cost. Cost reasons and construction.

Q. What were the functional reasons?

A. Efficiency of space.

Q. At what point in the process did they suggest building or putting a condominium unit over the garages?

[35] A. At what point? After we had met several times.

Q. Did they give an explanation for why they wanted an apartment unit over the garages?

A. My recollection was that it was density.

Q. What specifically about density?

A. They wanted it to be higher.

Q. Now, at the time that the decision or the request was made to move from a ten-unit building to a twelve-unit building, were you still working only on Chatterton, that is to say the Canton Township?

A. I believe we were.

Q. At what point did you also become involved in working on the Genoa Township project?

A. I don't recall the exact dates, but at some point in time Steve Friedman indicated they had another project. The exact time, I don't recall.

Q. Was that, at that time was it, did he indicate that they wanted ten-unit buildings or twelve-unit buildings?

A. In Genoa Township?

Q. Yes, sir.

A_ Twelve-unit buildings.

Q. Now, I want to back up a second. At the time you began your discussions with Mr. Friedman, [36] were you also working on a condominium project for Cross Winds Communities located in Waterford, Michigan?

A. I don't think so.

Q. Let me just to perhaps refresh your recollection. Well, let me back up and maybe I asked the question in the wrong

way. Was Progressive architects as opposed to you personally working on a project in Waterford for Cross Winds?

A. At that time?

Q. Yes, sir.

A. I don't believe so.

Q. You are familiar with a property in Waterford Township called the Heritage project?

A. I am.

Q. You worked on that project; did you not?

A. I did.

Q. And who did you work with at Heritage?

A. Within Progressive Associates?

Q. Within Heritage or within Cross Winds?

A. A number of people.

Q. Including—who were they? Who was your principal contact?

A. My principal contact was a gentleman named Joe Bach, B-a-c-h.

[37] Q. When did you, had you or Progressive worked on other projects for Cross Winds condominium projects?

A. Yes.

Q. Were you one of the persons who worked on their Brush Park project?

A. I did some work on the Brush Park project.

Q. Who primarily within Progressive was responsible for the Brush Park project?

A. Myself and Dan Tosch.

Q. Who designed those condominia?

A. Which condominium?

Q. Brush Park condominium?

A. Would have been Dan.

Q. What was your role in that project?

A. I attended some meetings with another architectural firm who was also involved in the development of the Brush Park with Cross Winds.

Q. Who was that other architectural firm?

A. That would have been Hamilton Anderson & Associates.

Q. Now, had you worked on projects other than the Brush Park project before you got involved with Heritage?

A. Many.

[38] Q. Excuse me, I didn't ask my question very intelligently. I apologize. Had you worked on other Cross Winds projects?

A. Yes.

Q. What other Cross Winds projects had you worked on?

A. Condominium projects located in Wyandotte, Detroit, Dearborn,.

Q. Which are the other projects in Detroit?

A. Let me think. I can't recall the name right now. In the New Center.

Q. Near the New Center?

A. Yes.

Q. You guys worked on that one?

A. Yes.

Q. Now, let me see if I can help refresh your recollection a little bit. I'm going to show you a document that we marked during Mr. Tosch's deposition as Exhibit 38. By the way, I think these are copies) for—why don't you hand these out to these other gentlemen. I show you a document that we marked during Mr. Tosch's deposition as Exhibit 38. It appears to be a fax cover sheet with some drawings that are from a Kevin to a Chip on Progressive letterhead dated March 12, 1998. Have you seen that document before, sir?

[39] A. I believe I have.

MR. HEALY: You saw the first page?

THE WITNESS: No, I don't recall seeing the cover sheet.

Q. You know Chip to be Mr. Chip Ironside?

A. That's correct.

Q. And Kevin is who?

A. Kevin was an employee of Progressive Associates at the time.

Q. What was his last name?

A. I don't recall.

Q. If we look at, with my aged eyes which has a hard time with this type of stuff, the second page which has a Bates number PR00137, that indicates that this project commenced in what year, '98. You date your projects?

A. Based on the project number?

Q. Yes.

A. I can't really make that out as to what it is to be sure.

Q. Don't we have the bigger one that we could blow up? But I think the, it will suggest to you, I think, that the evidence will indicate that this project was commenced in '98, that these drawings were done in '98 as reflected by the cover sheet. Had you [40] seen this, did you have involvement in this project from its inception?

A. No, I did not.

Q. Who contacted Progressive about the Heritage project; if you know?

A. I don't know who the original contact was.

Q. I'm going to show you now a large document which I'm going to mark as an exhibit.

DEPOSITION EXHIBIT NUMBER 56 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. This particular document allows us to read a little bit better the project number. It is a proposed condominium residential community site concept. The date of the particular sheet which appears to have been drawn by ci, we can agree that 7 would be Chip Ironside; can we not?

A. We can.

Q. Is dated February 1999. That would reflect, would it not, that the project number is 98279.

A. Yes.

Q. Does that now refresh your recollection that you were, that Progressive was working on the Cross Winds project in the '98, '99 time frame?

[41] A. Yes.

Q. Your first contact with Mr. Friedman was in 2000?

A. Thereabouts.

Q. Late '99 early 2000?

A. Yes.

Q. So does that now refresh your recollection you were working on the Heritage project, you began work with selective?

A. That wasn't your original question.

Q. Okay. What was my original question?

A. Were we working on this at the time that I first talked to Mr. Friedman.

Q. Okay. The answer was no?

A. That's correct.

Q. You didn't continue work through the 2000 time frame on this project, the Heritage project?

A. Well, my recollection was that we were pretty well done with this project at that time in terms of the design and the construction documents.

Q. Let me show you a document then that is, I'm going to mark as the next exhibit.

DEPOSITION EXHIBIT NUMBERS 57-60 WERE MARKED BY THE REPORTER FOR IDENTIFICATION?

[42] Q. I've marked as Exhibit 57 Attard deposition—

MR. CANTOR: That's five seven?

MR. WASINGER: Five seven.

Q. A fax cover sheet on the Progressive letterhead that appears to be from George Attard to Sue R. Would you agree that would be Sue Rosting if she was with Cross Winds Communities?

A. I believe that's correct.

Q. It's dated June 23, 2000, Bates number PRO0112 and PR00113.

MR. CANTOR: May I see that, please?

MR. WASINGER: You can come look at it.

Q. Is that your handwriting, first of all, on the first page?
A. It is.
Q. And does that indicate you were working on the Cross Winds project in June of 2000?
A. No.
Q. It doesn't? Okay. what were you doing in June of 2000 transmitting—
A. It indicated that Sue Rosting apparently called me and requested that I send her a copy of the composite building elevations as they were on that [43] date.
Q. Let me show you what I've marked as Exhibit 58, Attard deposition. This appears to be some sort of typewritten document from yourself relating to Heritage, Waterford Township, October 30, 2000. Have you seen that document?

MR. CANTOR: Before you answer any questions, would you pass it down?

MR. HEALY: You're entitled to see it too.

Q. Pay particular attention to the body of the document which refers to plans being drafted I think in what, August of 2000?

MR. CANTOR: Before you answer any questions, may we see that exhibit, please?

MR. LALONE: Note that's Bates number PRO108, please.

Q. Does that refresh your recollection of your working on plans at the time you were also working on the Hampton Ridge and Chatterton project?
A. This does not indicate to me we were still working on the plans at this time.

Q. Let's take a look at Exhibit 59. Before you do that, let me identify it in to the record. This is a memorandum that appears to be from Mr. Attard to Mr. [44] Ralph Rangel, R-a-n-g-e-l, at Boca, B-o-c-a, International. It's a three-page fax memo, the first Bates number of which is PRO0105, the last is PRO0107. The last two pages are floor plans on the Progressive drawings. We'll get in to those in a second.

DEPOSITION EXHIBIT NUMBERS 61 & 62 WERE MARKED BY THE REPORTER FOR IDENTIFICATION.

Q. You wrote that letter, sir?

A. Yes.

Q. Take a look at those drawings. Do they have various dates on which things were done?

A. Yes.

Q. And what do they indicate? What are the dates reflected on those drawings?

A. Foundation permit, June of 2000. Permit bids, August of 2000.

Q. Then do they have a revision date at the request of owner?

A. Revision, revised for developer 11 of 2000.

Q. Does that refresh your recollection that you were working on the Heritage project in the summer and fall of 2000?

A. Based on the dates, it appears we were working on them in 2000.

[45] Q. And—

DEPOSITION EXHIBIT NUMBER 63 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. Now, by the way, just to further reflect what we're talking about, you people keep time records of time that you bill on an hourly basis your clients typically?

A. Not always, but sometimes we bill hourly.

Q. You did in this instance?

A. Yes.

Q. Cross Winds instances. I'm going to show you a document which we've marked as Exhibit 63, Attard, it's PR00004747 and 48. That's an invoice that was sent from Progressive to Cross Winds Communities; is that right, sir?

MR. CANTOR: Before you answer that, may we see it, please?

Q. That's just an invoice that you sent that reflects various work that was done in that time frame; is that right?

A. That's correct.

Q. It reflects drawing in the July time frame. What's the date? Isn't that July?

A. The drawing period was June.

[46] Q. Okay. June. But that's a—

A. The bill was sent in July.

Q. Let's go back, if you would, and look at the site concept that has been marked as Attard 56. Did you have any involvement in this kind of proposal?

A. No.

Q. Who came up with this design?

A. I believe it would be Chip Ironside.

Q. Now, you're talking that's Mr. Ironside would have come up with the site design?

A. Correct.

Q. I was looking more at the composition or the, for lack of a better word, the plan of the actual units. Did you have any involvement in that?

A. No.

Q. Now I'm going to mark as the next exhibit—

DEPOSITION EXHIBIT NUMBER 64 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

Q. —64, a plan that is called a Heritage unit landscape. It's dated 8-13-99, Bates numbers PR00070. Now, I understand this is a landscape concept, but I have, I want to ask you

some questions about the building that is depicted in the landscape [47] concept.

A. Uh-huh.

Q. Have you ever seen that building layout?

A. The building layout?

Q. Yes.

A. Not specifically this plan?

Q. Not specifically this plan.

A. Yes, I believe I have.

Q. Did you have any involvement in the creation of this particular building layout?

A. No.

Q. Who did?

A. To my knowledge, Dan Tosch.

Q. What we have here is a situation that there are what, six garages on each side of the building?

A. Correct.

Q. And entry ways to what appears to be four of the units are through the side of the building as opposed—is that right?

A. That's the way it appears, yes.

Q. And so you have a garage and entry way to a unit that is from the outside that also has access to the outside and the garage; is that correct?

A. That's correct.

Q. Then you have the second garage after that [48] entry way which has appears to be access to an upstairs unit?

A. That is correct.

Q. And you have, that upstairs unit also has an access from the front of the building; is that correct?

A. That is correct.

Q. And then you have two garages where there's direct access to two lower floor units; is that right?

A. I believe so.

Q. Do you know why this design wasn't used?

A. I don't.

Q. Did you have any discussions with anyone at Cross Winds as to why this design was unacceptable to them?

A. I don't recall having conversation.

Q. Who was that person within your organization who was primarily responsible for dealing with Mr. Glieberman- and persons on the Heritage project?

A. At the designs?

Q. Right?

A. Dan Tosch.

Q. Did you ever meet with Mr. Glieberman as regards the Heritage project?

[49] A. I don't recall.

Q. Did you have any discussions with representatives of Cross Winds or Mr. Glieberman about his desire to use the Aberdeen named project as a model for what he wanted to do at Heritage?

A. No.

Q. Had you, have you heard of the name Aberdeen?

A. Yes.

Q. When did you first hear of that name as associated with a condominium project?

A. My recollection is after this lawsuit.

Q. Now, were you aware that—well, did you review any competitive project analyses that were created by Heritage to reflect what the market was looking for in condominia?

A. Could you repeat that? I'm not sure --

Q. Did anyone within the Heritage organization share with you any market analyses they had done reflecting what the condominia, what the features of the Heritage condominia should be?

A. No.

Q. Have you ever seen any market analyses of the condominium market in the Southeast Michigan area?

A. Not that I can recall.

[50] Q. Now, I've marked as Exhibit 60, I'm jumping around a little bit but there's a method to my madness. I've marked

as Exhibit 60 a transmittal that appears to have been from yourself to a gentleman by the name of Gary Peterson at Zeimet-Wozniak & Associates dated March 16, 2000. Do you know Gary Peterson?

A. I do.

Q. Had you worked with Gary Peterson prior to being, your discussions with selective?

A. Yes.

Q. Let me show you now the Exhibit 60.

MR. CANTOR: May we see that, please?

DEPOSITION EXHIBIT NUMBER 65 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

Q. That references a transmittal in what's the date of that document again, sir?

A. March 16, 2000.

Q. That references a transmittal of a Bogaerts' plan; does it not?

A. A site concept.

Q. Is that, do you know what type of buildings were depicted, that is to say the number of units in [51] the buildings in the Bogaert site concept?

A. I don't recall.

Q. Why were you transmitting a Bogaerts' site concept to this gentleman? This is an engineer; is it not?

A. This is an engineer.

Q. Why were you doing that?

A. I don't recall. Seemed to me Zeimet-Wozniak was working on the Canton project with selective at that time.

Q. Why were you sending them a Bogaerts' site concept?

A. I don't recall that why.

Q. Now, as reflected in Exhibit, as reflected in Exhibit, what is the number? As reflected in Exhibit 38 which is this drawing that is attached to the memo from Kevin to Chip dated March 12, '98, in the '98 time frame as well, you had this entry in to the Heritage projects through a garage, a

separate entry way between the first and second garages; is that right?

A. That's the way it appears, yes.

Q. Do you know why that, do you know whether that plan or that arrangement was used in the final Heritage drawings?

[52] A. Do I know whether or not it was used?

Q. Yes.

A. I believe it was not used.

Q. Do you know why it was not used?

A. The developer decided they wanted to do something else.

Q. Did they explain why they wanted to do something else?

A. Not to me.

Q. Now, did you have any discussions about this possible type of arrangement with the people at selective, that is to say some of the units would have their access from the sides of the buildings, not from the front of the buildings?

MR. HEALY: It doesn't seem to be an exhibit number on this.

MR. WASINGER: I know, because I don't have the marked one.

Q. Exhibit 38.

A. No, I'm sorry, repeat your question.

Q. The layout as reflected on Exhibits 38 and Exhibit 64 where you have a garage, an entry, a garage, was that the kind of layout suggested as a solution to what selective wanted?

A. I don't recall ever suggesting that to [53] them.

Q. At the time that you had the original Bogaert layout, there were five garages on each end, right, of a ten-unit building?

A. Are you asking me if Bogaert—

Q. The time you, at the time you became involved, Mr. Friedman showed you some drawing of Bogaert; is that right?

A. That is correct.

Q. It was a ten-unit building?

A. I believe it was.

Q. Did it have five garages at each end?

A_ I don't believe that it did.

Q. Did it have any garages at either end?

A. I believe that it did.

Q. How many garages did it have at the ends?

A. I believe it was four.

Q. So the units in the middle did not have a garage at all; is that what you understand?

A. No, that's not what I understand.

Q. Where was, was there five, did each unit have a garage?

A. I believe it did.

Q. Where was the fifth garage?

A. It would have been on the other side of the [54] building.

Q. On the front of the building or the back, depending on which way you're looking at it; is that right?

A. Correct.

Q. Was it attached to the townhouse?

A. Attached? I believe it was.

Q. So let's go back a minute to the site plan I showed you earlier. I mean, excuse me, the building that I had shown you earlier, the elevation which was 85. That has no garage on the front; would you agree?

A. I would agree.

Q. So your indication is that there was also some sort of elevation of a ten-unit building which had a garage, what, one garage or two garages on the front and back of the building?

A. I'm not indicating that there was an elevation with a garage on the front.

Q. I know. I'm not saying you're saying there was an elevation, but there was a floor, some sort of floor plan I take it?

A. I wouldn't call it a floor plan.

Q. A sketch, a sketch from the top down?

A. Yes.

Q. It had a garage on the front of the [55] building?

A. Front or the back. I don't recall.

Q. One garage or two garages?

A. I'm not sure.

Q. Did you discuss with Mr. Friedman whether that kind of layout of the building would be acceptable to him, that is to say a garage on the front or back of the building?

A. I don't recall a specific discussion, but I believe we probably discussed it.

Q. Did he have a view about whether that was a good way of doing it or a bad way of doing it or—

A. My recollection was they wanted the garages to be on the ends.

Q. Now, I have marked as Exhibit 65 a letter dated April 20, 2000 which appears to be on your signature and appears to have been signed by selective Group on April 22, 2000. Can you identify that document, sir? Have you seen that letter before, sir?

A. Yes, I have.

Q. Is that, in fact, your signature on that letter?

A. Yes, it is.

Q. At what stage of your discussions with Mr. Friedman was that letter prepared?

[56] A. Well, based on what I read, it appears that we had already done some very conceptual work for Mr. Friedman and we were still in the very conceptual stages.

Q. Now, is this, would this have been after your second meeting or after, or even later than your second meeting?

MR. HEALY: The date of the letter, is that what you're saying?

MR. WASINGER: Yes.

A. I believe it's at least after our second meeting. whether it was after additional meetings or not, I don't recall.

Q. Now, there's a reference in the document to the question whether there would be attached garages. Do you see that reference?

A. Yes.

Q. What was the, can you read out loud that particular sentence that speaks to the question of garages?

A. "It has not been determined if all or a portion of the units will have attached garages nor has it been determined if all or a portion of the dwellings will be back to back or townhouse style."

Q. When was it decided whether they would be [57] back to back or townhouse style do you think?

A. I don't recall.

Q. Who made the decision whether it would be back to back or townhouse style?

A. The selective Group.

Q. Did you have any input in to the question whether it should be back to back or townhouse style?

A. Other than providing conceptual plans for them to view, no.

Q. Did you provide conceptual plans reflecting a townhouse style?

A. I believe we did.

Q. Did you provide conceptual plans of buildings that did not have attached garages?

A. A portion of the units would not have attached garages in one or two of our concepts, yes.

Q. In your townhouse style buildings, how many units, living units per building would there be?

A. I believe there were ten.

Q. Would that then indicate that there would be back to back townhouses or would it be a long building, ten units?

A. It would be a long building. some of the units were back to back, some were townhouses that may have been back to back.

[58] Q. Did you ever prepare any that had no back to back units, any concept drawings?

A. For the selective Group?

Q. Yes, sir.

A. I believe not. No. No. I think we did—

Q. Is there, who, what was the ultimate explanation for why you would go to the back to back type of building?

A. That's what our client desired.

Q. Did the client explain why they desired that?

A. Not in any great depth.

Q. Did they give you any explanation at all in great depth or otherwise?

A. Economies of construction.

Q. How would they be more economical to construct?

A. Using common walls as a general practice so that buildings can share some of the utilities that are inside the building. Building less exterior wall, generally is I'm told by builder developer types is less expensive.

Q. Did you have any discussions in this time frame about well, when was the decision made that there would be attached garages again?

[59] MR. HEALY: I'm just going to kind of object to the form of the question.

MR. WASINGER: That's fine.

Q. But your letter dated April 20, 2000 which is marked as Attard Exhibit 65, it addresses the Chatterton, says as of this date, it has not been determined if all or a portion of the units will have attached garages nor has it been determined if all or a portion of the drawings will be back to back or

townhouse style. When was the decision made that all of the units would have attached garages?

A. I don't recall.

Q. Who made that decision?

A. Selective Group.

Q. Do you know who within the selective Group made that decision?

A. I know that decision was transmitted to myself by either Mr. Friedman and/or Mr. Cantor.

Q. What explanation was given for having all of the units have attached garages?

A. I believe their studies indicated that they needed to do that.

Q. When you say they said their studies indicated, did they indicate to you what studies they had done?

[60] A. No.

Q. But they did indicate that they had done studies which indicated the market demanded that all the units be attached?

A. They had not indicated they had done formal studies if that's what you're implying.

Q. They had done something to study what was in demand, they had concluded that there would have to be attached garages?

A. Yes.

Q. Did they describe to you what investigations or studies they had done in that regard?

A. No.

Q. When was the decision made to have all of the garages on the ends as opposed to some in the front or back and some on the end?

A. I don't recall.

Q. Was it at the same time that they decided they wanted all the garages to be attached to a dwelling unit?

A. I don't remember.

Q. Who made that decision that all the garages would be on the side as opposed to the front?

A. The Selective Group.

[61] Q. Who was that? Again, is that the same person, either Mr. Friedman or Mr. Cantor?

A. I don't know if they ultimately made the decision within selective there, the individuals that transmitted that information to me.

Q. Was this at a meeting or at some, in some phone conversation?

A. I believe it was, I don't remember.

Q. Did they give you an explanation why they wanted all of the garages on the sides as opposed to some on the front?

A. I think they were concerned about the, what we sometimes call street scape of how the buildings appeared from the road.

Q. Did they discuss with you at all whether the garages in the front would effect the site density?

A. I don't believe we specifically discussed that.

Q. Did you discuss the fact that there would have to be more parking and more roads if they had all, if they had some of the garages on the front?

A. I don't recall.

Q. Now, at some point in this process, you also became involved in the project in Genoa, right?

[62] A. That's correct.

Q. Was the decision whether to have all of the garages on the sides before or after you became involved in the Genoa project?

A. I believe it was before.

Q. It was before?

A. I believe it was.

Q. Now, did you essentially conclude that you would do the same exact building to the extent the site would permit for both Genoa and Canton Township?

MR. HEALY: I'll object to the form of the question.

Q. Was it decided, whether by selective or Progressive, that the same exact building, subject only to site considerations, would be used in both Genoa and Canton Township?

A. Repeat the question again, I'm not—

Q. Let me make a preface to it. From a lay observer's perspective, there appears to be little, if any, difference between the buildings constructed at Hampton Ridge and the buildings constructed at Chatterton, that is to say the twelve-unit buildings.

A. Uh-huh.

Q. Would you concur in that assessment?

MR. HEALY: I'll object to the form [63] of the question.

Q. You can answer.

MR. HEALY: If you understand the question, then answer it. If you don't understand, then ask him to—

A. From the plan point of view, yes.

Q. My question was who made the decision to use essentially the same plan at Hampton as at Chatterton?

A. The Selective Group.

Q. Who within the selective Group?

A. Again, the person that transmitted that information to me would have been Steve Friedman, I believe. Who ultimately made that decision within their organization, I have no idea of knowing who.

Q. Did Mr. Friedman give you any indication why they wanted to build essentially the same building? I understand the difference between, I'm going to give you again a little editorial just so we don't confuse each other. As an architect, I'm sure that there are things that--well, I'm not going to give that speech.

MR. CANTOR: Excuse me, Counsel, I object to the form. It's incomprehensible.

MR. WASINGER: I hope it's [64] incomprehensible. I'm going to stop the question, start a new one. Thank you.

MR. CANTOR: Now we both know.

Q. Did Mr. Friedman explain why they wanted to build in Hampton, what they were going to build at Chatterton?

A. No.

Q. Did you from that point in regard to your design essentially build, I mean design one building for both?

A. In terms of the design, that's substantially correct.

Q. Now, who was that person that was primarily responsible for the design of the Hampton, Chatterton building within Progressive?

A. That would be me.

Q. So you drew the elevations and you drew the floor plans, that sort of thing?

A. Dan Tosch and I worked hand in hand on plans. Dan would draw elevations.

Q. Was there input from the selective Group with respect to the layout of the buildings?

A. Yes.

MR. WASINGER: If—what time is it? Let's take a break. Can we take the lunch break [65] right now?

(Recess for lunch from 12:05 p.m. to 1:10 p.m.)

Q. I want to show you without marking it right now, but just simply for purposes of a time line, a set of plans. well, I'm going to just show you the first page of a plan that has Bates number PR00217 that is dated June 23, 2000. You've seen that before?

A. Yes.

Q. And this is, this particular sheet is proposed floor plans Fox Run. We've agreed Fox Run is the Hampton Ridge condominium?

A. That is correct.

Q. If we go back to try to just get a sense of time, your letter to Mr. Friedman in April of 2000 indicated there had not yet been a decision, I'm referring to Exhibit 65, April 20th, there had not yet been a decision about which portion of the units would have attached garages nor had it been determined whether they would be back to back or townhouse style. By June 23rd it appears that there have been some decisions I take it, namely that there are going to be six attached garages in a row, right?

A. It appears that's the case. But this is for Hampton Ridge was that letter.

[66] Q. That involves Chatterton. I thought you did basically the same building for both?

A. Yes, we did, but it doesn't necessarily mean that they've made an ultimate decision on chatterton.

Q. I understand. But they did make the decision with regard to Hampton Ridge or was this only a concept type of drawing that is reflected in the June time frame?

A. This is the drawing that was presented for them, they requested for use in their site plan approvals, I believe.

Q. In fact, if you look at the second page which is Exhibit 208, it actually has Mr. Tosch's seal?

A. Correct.

Q. My question I guess is when in this period after April of 2000 was the decision finally made to go with the six garages in a row, back to back, stacked ranch?

A. I can't tell you exactly when.

Q. Well, do you think—

A_ Sometime in that, sometime between those two obviously.

Q. You think that, do you think that it was in [67] the May period, the June period?

A. I wouldn't—I'd be guessing.

Q. Now, I want to also show you again for purposes of question, this is a site plan approval elevation; is it not? It's part of that same set of plans dated June 23, 2000?

A. Yes.

Q. These are the elevations for the Fox Run condominium?

A. Yes.

Q. Who drew those elevations? I mean who was responsible for the design of those elevations?

A. That would have been actually myself and Dan Tosch.

Q. Who was, whose decision was it to put the chimneys where they're located?

A. That was my decision based on conceptual floor plans.

Q. And when we say conceptual floor plans, let's go back a second. Who if anybody made the decisions about how the internal space would be laid out?

A. That would be me.

Q. So you were the one that decided to have the buildings on each side, I mean the bedrooms on [68] each side of the living room?

A. That's correct.

Q. And you were the person that made the decision to have the fireplaces in the living room facing the outside walls?

A. I'm the person that suggested that and I'm the person that suggested the bedrooms there. Ultimately the developer is the one that approves their locations.

Q. Had there been any thoughts as to a different way of arranging these bedrooms and arranging where the fireplace was?

A. Well, yeah, there was thought. There's always thought. Yes.

Q. What was the reason why this particular layout was ultimately chosen?

A. That's what the developer wanted, liked.

Q. Why?

A. Why the developer liked it? I'd be speculating.

Q. Let me indicate that as we were talking about it in some of the early drawings that were done on the project for Cross winds, you recall that the bedrooms were side by side?

A. Yes, I believe that's true.

[69] Q. And do you know why the—did you propose a plan to Selective people that would also have the bedrooms side by side?

A. I don't recall if we had a proposal of that nature.

Q. Do you know why, do you know what explanation was given for having the bedrooms separated?

A. Explanation from selective?

Q. Yes.

A. No, I don't.

Q. If we look at by way of example, this June 2000, as a matter of fact, if we look at the dates, June 23, 2000 is the date of the Fox Run proposed floor plans, PR00217, and the Fox Run elevations, right? Those are also June 23, 2000.

A. Yes.

Q. Okay. That is the same date on which you sent to Sue Rosting at Cross Winds some elevations for Heritage. The date of your fax is June 23rd, the date of the elevation is June 19th. Do you see that?

A. I do.

Q. The Cross Winds building apparently does not have the fireplaces in the bedroom, excuse me, in the same configuration as the Heritage. Did you have a [70] discussion with them as to whether they would prefer to have no fireplaces or to have fireplaces in the locations, I mean in the elevations?

A. Did I have discussions with selective?

Q. Yes. Did you give them the option that you could do it this way or this way?

A. No. Well, they asked us, they told us they wanted fireplaces and we came up with the location and apparently they liked it.

Q. Did you have fireplaces in the Heritage?

A. I believe there are fireplaces in the Heritage ultimately.

Q. So is what they told you is they wanted the chimneys on the outside of the buildings with the fireplaces facing the outside wall?

A. They didn't tell us that. They told us they wanted fireplaces.

Q. Did they tell you where they wanted the fireplaces?

A. They, I believe they said they wanted them in the living rooms.

Q. Did they tell you whether they wanted the chimneys to be on the exterior wall as an architectural feature of the elevations?

A. They did not tell us that.

[71] Q. You came up with that idea?

A. I think I have, yes. Originally they may have wanted fireplaces in the master suite I believe too. That ultimately didn't happen.

Q. It would have been your idea to have put the fireplaces there; is that correct?

A. That's correct.

Q. If we compare again the Heritage with the Fox Run or Hampton Ridge, again, I'm comparing Exhibit 57, the Heritage elevation with the plans that have the Bates number PR00219. Was it your idea to have the dormers or was it theirs?

A. That was our idea based on their request that it have a very traditional look.

Q. Did Mr. Glieberman want a traditional look or not?

A. Not to the same extent apparently that Selective did.

Q. Did Mr. Glieberman ask you to eliminate the fireplaces in the front and to eliminate the dormers in the front?

A. I don't know.

Q. That was more Mr. Tosch's issue?

A. Yes.

Q. Do you recall Mr. Tosch informing you that [72] Mr. Glieberman indicated that he wanted to use the Aberdeen design and change it in some respects so it looked different?

A. No.

Q. Have you seen discovery responses in this litigation where Mr. Glieberman indicated that they use the Aberdeen design but wanted to make changes?

A. No, I have not seen that.

Q. Let's go back, if you would, to the second floor plan and the first floor plan which is—

MR. CANTOR: Excuse me, Counsel. Probably save a lot of us some time if you can give us the reference.

MR. WASINGER: You're counsel to those people. You better talk to them. I'm not going to waste my time.

MR. CANTOR: If you're asserting facts like this, I object to the alleged statement of facts that are clearly without precedent, without foundation.

MR. WASINGER: I doubt that very much. As counsel of record, I would assume you'd be fully familiar with all of the discovery responses.

Q. PR00217. This is the, this indicates the, now the floor plan that shows that the garage, I mean[73] excuse me, that the chimney is in the exterior wall of the living room?

A. Yes.

Q. Bedroom on either side, right?

A. Correct.

Q. Now, let me now look at the Cross Winds' floor plan. This is drawn in March of 2000, it looks like that's the date, and it's drawn by K.K., S.M. who are those persons?

A. Those would be drafts people in our employ.

Q. It was checked by D.A.T. I assume that's Mr. Tosch?

A. That's whose initials those are, correct.

Q. Now, in this particular layout, there's a fireplace in the living room, is there not, of the A unit?

A. That is correct.

Q. The fireplace is now located on an interior wall?

A. That is correct.

Q. If we look at the elevations again, I think fairly similar to the June 19th elevation that's part of Exhibit 57, and for the record, I'm looking at that sheet that is PR00260. Again, no fireplaces?

A. That's correct, no fireplaces on the [74] exterior.

Q. Where were the chimneys? How did the chimneys bend out on the—

A. I believe these were going to be sealed units without vents. They're gas burning.

Q. All right. Now, let's change topics again for just a little bit. Are you, you've been there some 20 odd years I take it at Progressive?

A. That's correct.

Q. Had you worked on any projects prior to the Heritage project where you had this arrangement involving stacked ranches, attached garages on the end of buildings?

A. We've had similar projects.

Q. Which is that project which you believe prior to Heritage is similar?

A. There's Maple Place.

Q. Okay.

A. And a couple of different Maples that were done for the classic Construction people. There's some projects that pre-date me there that I was aware of through Mr. Tosch and his previous associate who's now deceased.

Q. What was his associate who's now deceased's name?

[75] A. Donald Erickson.

Q. Now, are you familiar with a project called, what's the heck's the name of it, Julie? MS. GREENBERG: Mill Point.

Q. Mill Point. Are you familiar with a project called Mill Point?

A. Mill Point?

Q. Yes.

A. Yes.

Q. Where is-that project located? Was that a Progressive project, let's start with that?

A. It depends what Mill Point project you're talking about. I believe that's a fairly common name for a project.

Q. Is there a Progressive project called Mill Point?

A. I believe there is.

Q. Where is it located?

A. I think the original one was in Westland, Michigan.

Q. Did you work on any of those projects, the Mill Point, starting with the one in Westland?

A. Yes, I did.

Q. Did those have attached garages?

A. Yes, they did.

[76] Q. Did they have stacked ranches?

A. No, I believe not.

Q. Did the attached garages have direct access to each of the units, in other words, one garage to one unit access?

A. Yes, they did.

Q. Now, in your work for Progressive, did you do any projects for a gentleman named Adorno Piccinni?

A. We did some projects for the Adco Group.

Q. You understand the Adco Group is a group with which Mr. Piccinni is associated?

A. That's correct.

Q. What is the first project that you can recall doing with Mr. Piccinni or Adco?

A. I believe it's the Southgate Apartments.

Q. Where were those located?

A. In Southgate.

Q. What type of apartments were those?

A. Those were of stacked, basically those? Stacked ranches back to back, side to side, two-story and three-story.

Q. With or without garages?

A. Those were without garages.

Q. Did you do any work in Sterling Heights for Mr. Piccinni?

[77] A. I believe we did.

Q. Did you?

A. Did I work—oh, yes, I worked on some projects in sterling Heights for Mr. Piccinni.

Q. Was one of the projects you worked on commonly known as Stratford village?

A. I believe that's correct.

Q. What was your role on the Stratford Village project?

A. I was the chief architect with regards to the design, development of the construction drawings.

Q. Is that for the condominia as well as the other buildings out there? I mean—let me back up a second. How many different types of buildings did you design and draw for Mr. Piccinni at Stratford?

A. I believe there were more than several types of buildings in the complex, how they went together.

Q. Did you work on all of them?

A. I worked on all of the ones that were under construction drawings, they decided what they were going to build.

Q. Who was responsible for the design of the buildings for the Stratford?

A. I believe that was Dan Tosch.

[78] Q. Did you visit that project site on more than one occasion?

A. I don't believe I've ever visited that project site.

Q. Did you see any of the—well, let me—did you do construction drawings for any twelve-unit condominia at Stratford?

A. I don't recall the exact number.

Q. Were you aware that there were some twelve-unit condominia designed for Stratford?

A. Like I said, I don't recall the exact numbers in the buildings, so my answer would be no.

Q. Did you design any units or involve yourself in drawing any drawings for Stratford buildings where the garages were on the ends and the units were arranged in a back to back arrangement?

A. I don't believe so.

Q. I want to just show you now what has been previously marked as Tosch Exhibit 36. It's a letter dated April 8, 1999 to Adco Construction and it indicates that there was a copy to Progressive Associates. Have you seen that document before?

A. No, sir.

Q. Were you aware that claims of copyright infringement had been made with respect to the [79] Stratford Village condominia?

A. No, sir.

Q. Were you ever advised that claims had been made in April of 1999 with respect to the Stratford Village condominia?

A. I don't recall being advised, sir.

Q. Now, when you had your various meetings with the people at Cross Winds, did you see any brochures for any condominia developments done by other persons other than Cross Winds and did they show you any kind of brochures of other styles of condominia they might be interested in?

A. No, sir.

Q. Now, do you know whether some parts of the Stratford project were discontinued?

A. I know that Adco did sell off parts that they ultimately did not do themselves.

Q. Do you know who they sold them off to?

A. I know one entity I believe was -- the answer to your question is yes.

Q. Who was the entity?

A. Palazola Brothers I believe is the entity I'm aware of.

Q. Do you know whether, do you know why they were, why they sold off?

[80] A. No. I don't know the specifics.

Q. Did you discuss with anyone why they were sold off?

A. Not specifically, no.

Q. Did you discuss generally with anyone why they were sold off?

A. I suppose I did.

Q. And what do you suppose you discussed?

A. For some reason Adco felt that they, it was in their financial benefit to sell to Palazola Brothers this particular section.

Q. Did they discuss with you any sales to either Moceri or Chirco?

A. They did not discuss that with me, sir.

Q. Did you ever come to inquire why Mr. Piccinni or Adco was not going to develop the larger number of unit condominiums?

A. No, I did not ask.

Q. Did you ever discuss that with Mr. Tosch?

A. I don't recall discussing it with Mr. Tosch.

Q. I want to mark a document.

DEPOSITION EXHIBIT NUMBER 66 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

[81] Q. The document itself isn't terribly important, but this is a document that I've marked Attard Exhibit 66. It's a letter or transmittal actually from yourself to a Lisa Sager at the selective Companies dated September 10, 2001. Again, the substance isn't important for purposes of my questions. You're obviously free to look at it.

MR. CANTOR: Could you send it down here, please?

Q. The question really has only to do with Lisa Sager. Did you deal with Lisa Sager on the Selective projects?

A. Yes.

Q. What is Lisa Sager's role with selective?

A. I believe she's an assistant to one of the construction people there.

Q. Have you dealt with Mr. Stapleton at Selective?

A. Other than one or to phone conversations, no.

Q. Who is your primary contact with, I take it you're aware that at some point Selective sold its business to Centex?

A. I'm aware of that.

Q. After selective sold its business to [82] Centex, who was your primary contact?

A. I believe it was a gentleman named Al Ludwig.

Q. Had Mr. Ludwig previously worked for Selective?

A. I don't know.

Q. Now, have you had any conversations with Ms. Sager, Lisa Sager, about the condominia at Chatterton or Hampton Ridge?

A. Yes.

Q. When did you most recently do so?

A. Probably in the last month.

Q. What happened in the last month?

A. She inquired, selective had had us made some changes to the drawings.

Q. Selective did, this is after the Centex?

A. I'm sorry?

Q. I think they still use the Selective name, but it's in the post-Centex era; is that right?

A. Yes. Yes. We've, we made various changes to the plans and there was inconsistency between the large scale plan and the small scale plan. She brought it to our attention and we corrected it.

Q. Have you had any discussions with Ms. Sager about the possibility that you would redesign the [83] condominia at chatterton or Hampton Ridge?

A. No.

Q. Have you had any discussions with anyone at—well, let me ask the question more carefully. Have you had any

discussion with Ms. Sager about whether you would be willing to design new condominia for Selective, Centex?

A. I have.

Q. When did you most recently have that conversation?

A. Probably in the last week.

Q. What was the nature of that conversation?

A. They, Centex, selective, had a design that they had for a new twelve-plex and she was going to put a copy in the mail for us to look at and wanted us to provide a proposal to selective for doing the construction documents for that prototype.

Q. Did she, in fact, send that to you?

A. Yes, she did.

Q. Did you review it?

A. I looked at it very briefly.

Q. In what ways was it a twelve-unit condominium?

A. I only say that because she told me that. I didn't look at the drawing long enough to deduce that [84] from the drawings.

Q. She told you it was a twelve-unit condominium?

A. That's my recollection.

Q. Did it have a footprint different than or similar to the footprint of the buildings that you, that Progressive did design work on for Hampton Ridge and Chatterton?

A. Did it have a footprint similar?

Q. Was the building footprint similar or different?

A. I didn't look at it in depth enough to establish that. I mean I don't know.

Q. What response did you give her about your willingness to assist in the design?

A. I told her that in light of the ongoing litigation, that it didn't seem that we would be in a position where we could give her a price to do that. And that doesn't mean that we didn't want to do the building for her, but until this litigation was decided, we didn't think we could.

Q. Did you understand why Ms. Sager was that person who was calling you about this issue?

A. Did I understand—

Q. Did she explain to you why she was the one [85] as opposed to Mr. Ludwig or someone else that was calling?

A. Basically she's the messenger, I believe.

Q. Why were you communicating with her? Why would you transmit plans to her, for example, as opposed to somebody else?

A. Because she's the one that requested them.

Q. Did Ms. Sager indicate where this new condominium would be located?

A. I don't recall.

Q. Have you had any discussions with any representative of selective or Centex about the lawsuit?

A. I have not.

Q. Have you had any discussion with any representative of Cross Winds about the lawsuit?

A. No.

Q. Now, I take it that you have continuing communications with people at Cross Winds relating to these buildings; is that right? Do you continue to communicate with people at Cross Winds about the project out in waterford?

A. Yes.

Q. Are you, in fact, involved in drawing for them or working on plans for another condominium [86] community using the Waterford design?

A. Yes.

Q. Where is that other community that you're working with Cross Winds?

A. I believe that's in Howell Township.

Q. What is the name of that community?

A. Jonathan's Landing.

Q. Have you, what is the status of the Jonathan's landing development?

A. I believe the construction drawings are at the municipality for approval.

Q. Who stamped those construction drawings, you or Mr. Tosch?

A. Mr. Tosch.

Q. Who have, have you done direct work on the Jonathan Landing drawings?

A. Yes, I have.

Q. Are they essentially similar from an architect's view? From my perspective, having seen those drawings, they seem to be the Heritage drawings, the Waterford Township drawings. Is there any material difference to the drawings other than the fact it's in Howell versus Waterford?

A. I believe there's some material difference, yes.

[87] Q. What is the material difference you believe to be, to exist?

A. The exterior amount of brick, things of that nature.

Q. What about the floor plans and—

A. It's primarily the same.

Q. And the location of the garages, that sort of thing, it's a twelve-unit stacked ranch?

A. That's correct.

Q. Back to back, right?

A. Correct.

Q. When did you start work on the Jonathan Landing drawings?

A. I don't recall exactly.

Q. Who asked you to do the Jonathan's Landing drawings?

A. Dan Tosch.

Q. Had you already been sued on the lawsuit involving Waterford when you started work on Jonathan's Landing?

MR. HEALY: Object to the form of the question.

Q. Excuse me. Had Progressive been, had there—well, let me back up a second. Did you become aware at some

point that there was a lawsuit relating [88] to the Heritage project in Waterford Township?

A. Yes, I did.

Q. How did you become aware of that?

A. Dan Tosch indicated that to me.

Q. Had you submitted drawings for Jonathan's Landing to Howell before or after you learned of the existence of the lawsuit relating to Waterford Township?

A. I believe it's after.

Q. Did you have any discussions with anyone at Cross Winds about the effect of the lawsuit on the Howell development?

A. I don't believe so.

Q. Who do you deal with on the Jonathan's Landing project from Cross Winds?

A. Primarily a gentleman named Joseph Bach, B-a-c-h.

Q. Who else do you deal with besides Mr. Bach?

A. Ken Lewis.

Q. Anyone else?

A. Those are the two primary contacts.

Q. Which engineering firm are you dealing with on Jonathan's Landing?

A. Are you talking about civil engineering?

Q. Yes.

[89] A. I don't recall.

Q. Have you dealt with any engineering firm in connection with Jonathan's Landing?

A. Yes.

Q. Who have you dealt with?

A. We've done work, we've been in contact with mechanical and electrical engineers.

Q. Did you make any presentations to the municipal authorities with respect to Jonathan's Landing?

A. I did not.

Q. Did anyone within Progressive make any presentations to the municipal authorities about Jonathan's Landing?

A. I don't know the answer to that, sir.

Q. I'm going to change the subject here again.

DEPOSITION EXHIBIT NUMBER 67 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. Before I deal with what I've marked as Exhibit 67, I want to—at some point you drew, you not only drew plans, I mean not only drew plans for condominia at Chatterton, you also did some work on some apartments; did you not?

A. That is correct.

[90] Q. At some point apparently someone else got involved in those apartments?

A. That's correct.

Q. Do you know who that someone else is?

A. I do.

Q. Who is it?

A. It's an architectural firm by the name of Balsamo. I don't know the rest.

Q. Did you deal with anyone, have you dealt with any individual at Balsamo?

A. I don't believe so. I may have had one conversation at one time with someone.

Q. Did you or anyone at Progressive authorize Balsamo to use the drawings you did at Chatterton for the basis of your work?

A. I don't believe there was any reason to do that.

Q. Did you understand that the work they did was based on the work that you had done to that point?

A. I did understand that.

Q. Did anyone at selective or Centex ask you or to your knowledge ask anyone at Progressive whether Balsamo could use those drawings?

A. I don't specifically recall them asking if they could use the drawings.

[91] Q. What explanation was given to you why Balsamo was going to come in and work on the apartments?

A. They wanted another professional eye to give them different concepts.

Q. Did you see the drawings that Balsamo ultimately put together?

A. I think i have seen them.

Q. Did you perceive any material difference between their drawings and your drawings?

A. Yes.

Q. with respect to elevation?

A. I don't recall the elevation to tell you the truth.

Q. With respect to floor plans?

A. Yes.

Q. What was the difference in the floor plans as you perceived them?

A. I think they have a different mix of units, they relocated some of the elements.

Q. Some of which elements?

A. Bedrooms, bathrooms, stairways, things of that nature.

Q. When is the last time you looked at the Balsamo drawings?

[92] A. I believe I looked at them briefly with Mr. Healy.

Q. Did you see the elevations?

A. I don't recall seeing the elevations.

Q. To go back, they said they wanted a different look or different professional look; is that right?

A. They wanted to get some other conceptual ideas.

Q. Conceptual ideas?

A. Some other ideas.

Q. Who told you that?

A. I believe it was Mr. Cantor, Mr. Glen Cantor.

Q. Did he explain why Balsamo couldn't give, mean did he ask you to give a different look?

A. Yes.

Q. Did you do that?

A. We had done several renditions of the floor plan.

Q. For the apartments?

A. For the apartments.

Q. And what was wrong with yours?

A. Nothing.

Q. Did they explain what they wanted done [93] different than what you had done?

A. They were looking to squeeze the areas of the dwelling units down even further than we had already squeezed them down.

Q. Did you not, you didn't think you were competent to do that?

A. We think we're very competent sir.

Q. What did—did you suggest you didn't have any ability to squeeze them down?

A. No, sir.

Q. So why did they think somebody else could squeeze them down when you couldn't?

A. I don't know.

Q. By the way, I want to mark this as an exhibit. I know I've skipped one I haven't referenced yet.

DEPOSITION EXHIBIT NUMBER 68 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. It has a series of drawings, apartments, 10-27-00. The first page is a side elevation of what would describe I guess as the front of the building. The second is a side elevation of what I would describe as the side of the building, but you may disagree with me. Have you seen these documents [94] before, sir?

MR. CANTOR: Before you answer that question, send those down here, please.

A. Yes, I have seen this before.

Q. What are those? Who drew those?

A. Progressive Associates drew them_

Q. Those are for the apartments; is that right?

A. It appears so, sir.

Q. How many units were to be in the apartments the way you were asked to draw them?

A. When we started, ten.

Q. Now, what's the date on that?

A. The handwritten date is 10-27-00.

Q. Did you subsequently then draw some that had more than ten units of apartments?

A. I don't recall. It's possible.

Q. If you look at the side view there are five garages; is that right?

A. Yes.

Q. And is it your understanding that in that proposal there would be, each of those five garages would have direct access to an apartment?

A. No.

Q. Which one wouldn't have direct access to [95] the apartment?

A. The two that are, the two doors that are shown in the middle, what would have been the middle if enough of this was completed.

Q. That's because those were going to be townhouses?

A. I believe in this case they were two flats.

Q. Two flats. Now, did you subsequently draw a twelve-unit apartment building for Chatterton?

MR. HEALY: Apartment, you said apartment.

A. I believe we did do some concept plans for twelve-unit apartments.

Q. I'm going to show you what has been previously marked in Mr. Tosch's deposition as Exhibit 33 called Chatterton Apartments. Have you seen that layout, building layout?

MR. CANTOR: Before you answer that, would you let us take a look at those drawings, please?

Q. Have you seen that or something like that?
A. I believe I have.
Q. Who drew that?
A. I believe this is Balsamo's, one of their drawings.
[96] Q. I want to show you what's been previously marked in Mr. Whitcomb's deposition as Exhibit 73. Have you seen that?

MR. CANTOR: May we look at that before you answer, please?

A. I believe I have.
Q. What is that?
A. This is a Chatterton building plan.
Q. For the condominia?
A. It doesn't say.
Q. Do you know whether that is a drawing that Selective, excuse me, that Progressive did for the apartments or for the condominia?
A. I believe this is for the condominia.
Q. Why do you believe that?
A. Because I know what the condominia looks like.
Q. What is different about the condominia and the apartment?

MR. HEALY: I object to the form of the question. If you can understand, then you can answer.

Q. He can understand.
A. I was going to say I don't know ultimately what the apartments that they've decided to build look [97] like, so I can't answer that.
Q. I speak to your design, your design of the condominia from your design of the apartments?
A. What's the difference?

Q. Yes. By way of example, I think we can agree there is no exterior fireplaces and chimneys on the exterior wall, can't we?

A. There's exterior fireplaces and chimneys here.

Q. On the condominia?

A. Correct.

D.. Did your proposed layout of the apartments have chimneys on the exterior wall or not?

A. May I see this? Based on these sketches, no, sir.

Q. But forgetting—did you do any proposals for the apartments which had chimneys on the exterior walls that you can think of?

A. I don't recall.

Q. where is my—if we look at the arrangement of the Balsamo floor plan with your Chatterton floor plan, we can agree I take it that there are six garages along each side, correct?

A. Yes.

Q. There's four living units on the first [98] floor, right?

A. Correct.

Q. And they're back to back arrangement?

A. Yes.

Q. There's a living room with bedrooms on either side, right?

A. It appears to be, yes.

Q. And there's the, whatever you want to call that, the walk-ins that have the, in the interior wall. That's similar; is it not?

A. Similar in the sense that the kitchen is against the wall.

Q. All right. There's some slight modification of the way the kitchen is laid out; is that right?

A. There's quite a bit of modification, yes.

Q. The layout of the kitchen?

A. Yes.

Q. But not in the location of the kitchen?

A. It appears that you're correct.

Q. Now, if we go to the, if we go to the walk-ups to the second floor, they're at the ends of the garages, is that correct, in the Balsamo apartment layout?

A. You're talking about the locations of these units, sir?

[99] Q. Yes. There's a stair at the end of each of the sides of the garage; is that right?

A. Yes.

Q. Therefore, the doorway is slightly different in terms of where you enter for the upper unit apartments?

A. Yes.

Q. Did you address the possibility of locating the stairways in that way or is that a Balsamo innovation?

A. Well, there's the Balsamo's drawing.

Q. I understand that. My question is did they come up with that or is this simply something that was in your drawings as well that they adopted?

A. I think they must have come up with that.

Q. You don't recall ever having designed or proposed a concept that had the stairwells at the end of the garages?

A. We may have internally looked at that, but we have never proposed that.

Q. Something just hit my attention as I was looking for this document. I want to show you what we've marked as Exhibit 26. Is that your handwriting, sir?

A. Yes.

[100] Q. That was marked as Exhibit 26 in the Tosch deposition.

A. Yes.

Q. That reflects what appears to be a conversation between yourself and Mr. Friedman on March 7, 2000?

A. That's correct.

Q. It references Geddes, Beck, Canton Township?

A. That's correct.

Q. It talks about does that mean eight twelve-unit buildings or eight to twelve-unit buildings?

A. I don't really recall.

Q. It says the site plan has yet to be done; is that what that—

A. That is correct. That's what it says.

Q. Then what does the next indicate?

A. Unit concepts.

Q. It indicates one, two, three?

A. One, two, three bedroom.

Q. 400 units?

A. Correct.

Q. Then it says apartments, upper middle scale. Is that what that says?

[101] A. Correct.

Q. What's the word under that?

A. With garages.

Q. With garages. Steve to send program to PA for proposal. Do you see that? Is that—

A. That's correct.

Q. Did I read that correctly?

A. Yes, you did.

Q. Now, sir, do you think this may be the notes of the first conversation with Mr. Friedman that we talked about?

A. It very well could be.

Q. So that would suggest that your first conversation was in early March, would it not, March 7th?

A. Yes. Yes.

Q. Did you ever get a program, a written program from Selective?

A. I believe that there was something in the file that we got.

Q. And have you searched your files to determine whether that program exists?

A. I think we saw it yesterday or the day before when we were looking through it, we were uncertain when it was given to us. I believe it's in [102] the file.

MR. WASINGER: You produced that.

MR. HEALY: Sure.

MR. WASINGER: Do you have a Bates identification for that?

MR. HEALY: No.

Q. What is it exactly so that I can—I mean what is that? Is it a memorandum, is it a drawing, what is it?

A. It was a typewritten eight and a half by eleven sheet; was it not?

Q. That was prepared by selective?

A. I believe so.

Q. Is it one of the exhibits?

A. I doubt it.

MR. WASINGER: Is it bigger than a bread box? Do you have a copy of it with you.

MR. HEALY: Maybe.

MR. WASINGER: We're going to—

MR. HEALY: This?

THE WITNESS: Yeah, I think this is—

Q. what's the Bates number; if you can tell me?

A. I think this is what I remember seeing.

[103] Q. Can we mark that or make a copy of it, mark it? while we're waiting for her to do that, I just want to make sure that I go through these. We've marked previously as Exhibit 4, Mr. Tosch's exhibit, a drawing. Have you seen that before?

A. Yes.

Q. Did you do that or Mr. Tosch?

A. That looks like I might have done that.

Q. Then we have what is the second page of Exhibit 4?

A. That's a rough concept for a, I believe a unit above the garages.

Q. So this would have been first idea, at some point somebody decided they wanted to have a unit above the garages?

A. I'm not sure first idea, but it is an idea.

Q. Now, there's the third page of Exhibit, Tosch Exhibit 4 is a kind of, what would you call that, it's got an elevation then it has this sketching out. Who did that? Do you think you did that?

A. I don't know who put the building together. Certainly our office, it looks like our office did this, yes.

Q. But you don't know if you drew that?

A. I don't know if I drew that. This looks [104] like something I would have scratched out.

Q. What is—now, we've got, we get down to what is I guess the last page of Tosch Exhibit 4. Do you know what this is?

A. Yes.

Q. What is it?

A. It's a concept drawing for a little bit more than half of a building showing the unit layout, couple unit layouts.

Q. I take it what we have here is a townhouse in the middle?

A. Actually these are two flats.

Q. I'm sorry, two flats. You're right. I see that. These are the ones that don't have access to the garage, the ones in the middle, correct?

A. That's correct.

Q. At this point you were still talking about a ten-unit building?

A. That's correct.

Q. Do you think these drawings were pretty early *in* your process of working with selective?

A. In the earlier stages, yes.

Q. Here's a document that is confusing. It's been marked as Tosch Exhibit 9. Is that in your writing or someone else's writing?

[105] A. That's my writing.

Q. Can you tell me the date of that document? It is somewhat confusing to me.

A. I believe I can because it's January 4, '01.

Q. It involves a discussion with Mr. Cantor?

A. Yes.

Q. Was that relating to the condominia or the apartments?

A. I believe that would have been relating to the apartments.

Q. And do your notes indicate this was, there would be a twelve-unit—well, tell me what this is because it looks like there's two different things here. can you just read what your notes indicate there?

A. Yeah. This part talks about of the twelve units they had made, he's telling me all they're all going to be twelve-unit buildings now.

Q. So they've now gone from ten to twelve?

A. That's correct. They made that decision. Two units would be 850 to 900 square foot one bedrooms. Two units would be 1250 to 1300 square foot three bedrooms. And eight units would be 1100, thereabouts, two-bedroom units.

[106] Q. And how did those compare with the condominia you had already created?

A. I don't know. I don't recall. I mean don't know offhand.

Q. Then read the rest of your stuff?

A. "All twelve-unit buildings, prefer all twelve with access to garage. Minimum ten direct access to garages." And the last part says "ten-unit buildings, make it twelve-unit buildings."

Q. Now, what are we talking about here on Exhibit 10? Is this yours or is this somebody else's?

A. This is Progressive Associates.

Q. Is that how many units in those buildings, in that building that's reflected there?

A. Twelve units.

Q. Where are the twelve units? Looks like you have four on the first floor, right?

A. Correct.

Q. Where are the rest of them?

A. Four more up above and building two, four over the garages.

Q. So at this point you were already talking about your twelve-unit building with two above the garages; is that right?

A. with four above the garages.

[107] Q. I mean, excuse me, twelve units with units a above the garages to make up the twelve?

A. That's correct.

Q. We already talked about a straight line arrangement of the garages; is that right?

A. That's correct.

Q. Okay. Now, here's my next question for you. If we look at the document which is Exhibit, Tosch Exhibit 12, this is a design, it appears to say Chatterton, selective up there; does it not?

A. You can't tell for sure, but it appears that way.

Q. Certainly says Selective, doesn't it?

A. Yes, it says Selective.

Q. Does that look more or less like the Heritage than it looks like the existing Chatterton?

A. I don't believe it looks any more like the Heritage than it does the Chatterton.

Q. You're talking now, though, this is still a ten-unit building; is it not? I mean

A. Yes.

Q. And so you have the lower roof line here but there are no, does not appear to be chimneys in the front of the building, right?

A. That's correct.

[108] Q. It doesn't appear to have the dormers?

A. No, it does have dormers.

Q. On just the garages, though, not on the living, not where the living units are; is that right?

A. Correct.

Q. Why was this approach not the way you went?

A. That's selective's decision again.

Q. This has the same profile, for lack of a better word, of the, of the building that had been shown you by Bogaerts, right? The garages that are lower on the sides?

A. It had that feature, yes.

Q. That's why I used profile just because didn't know a better word. But the Bogaerts building was a ten-unit building that had the lower, the garages on, a one-story garage with a roof, then the ten units interior, right?

A. I believe that's correct.

Q. Why were you still going with that kind of idea in what appears to be, I don't know what the date of this is, but would this have been one of your earlier drawings or not?

A. It could have been. It may have been.

Q. Is that your handwriting up at the top by the way do you think?

[109] A. Looks like it.

Q. Just so I don't forget it, Mr.—

DEPOSITION EXHIBIT NUMBER 69 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. Mr. Healy has been kind enough to provide a copy of a document which we've marked as Attard Exhibit 69, selective 404 apartments, Geddes, Beck Roads, Canton. Is this what you believe to be the program provided you by Selective?

A. Yes.

Q. You believe you received this from Mr. Friedman?

A. I believe so.

Q. Is that your handwriting on this building?

A. Up at the top?

Q. Yes.

A. That is not my handwriting.

Q. Who's Walt Copenen?

A. Walt Copenen is an architect.

Q. At Progressive?

A. No.

Q. Where is he an architect; do you know?

A. I believe he has his own firm, Walt Copenen and whatever, L.L.C. or something.

[110] Q. What is the Pilgrim Village? Do you know what that is?

A. I do not.

Q. Now, this talks about eight and twelve-unit buildings and some of the options, two two-story and three-story buildings. Do you see that?

A. Yes.

Q. Was there ever any discussion with Progressive about doing a three-story building?

A. There probably was some discussion. I don't recall it.

Q. Did you see some concepts from Bogaerts which were three-story buildings?

A. I did not.

Q. Was there any explanation given for why they didn't want to do the three-story buildings?

A. Not to my knowledge.

Q. I'm going to show you what has been previously marked as Friedman Exhibit 86. This is a Bogaerts' drawing in October of '98. That has 24 units, three floors, eight per floor. Have you seen anything like that before, and again I would indicate—

A. Yes, I've seen something like that before.

Q. I mean in connection with your consulting with [111] Selective, did they show you something like this drawing?

A. I don't recall seeing this drawing, sir.

Q. But I'm not asking this specific piece of paper. Did they show you any Bogaert concepts, rough drafts, proposals, that had this type of arrangement and look?

A. I don't recall seeing any rough drafts from Bogaerts via Selective that showed three-story buildings.

Q. I was going to ask the question it appears that these have no garages associated with them. Just if you take a look at what the building plan is would you agree with that?

A. I would agree with your observation.

Q. The plan that was, that we've marked as Attard Exhibit 69 says under point three, "Add some garages to ends of buildings." Do you see that?

A. Yes, I do.

Q. It says "Direct access to as many units as possible." When you did your, the drawing that we previously looked at that had the ten units, is there a reason that you didn't have direct access to all of the ten units? Remember I showed you a drawing that you had prepared of a ten-unit building where there [112] were some flats in the middle that didn't have direct access to the drawing—I'm going to specifically show you again.

A. I do remember.

Q. For the record, it's the fourth page of Tosch Exhibit 4. This is the one that has in the first floor we're dealing with half a building; are we not?

A. A little more than half, yes.

Q. We have two units that have direct access to the garage and then we have these middle flats that do not appear to have direct access to the garage?

A. That's correct.

Q. They have a garage, they just don't have direct access to it?

A. That's correct.

Q. Is there a reason given this kind of program that's Attard Exhibit 69 that you didn't draw all of the units with direct access?

A. Yes.

Q. What was that?

A. The reason is point number three says "Direct access to as many units as possible." Not all the units.

Q. I understand that. But as possible. Is there, you couldn't figure out a way at this point to [113] do it with direct access to all of the units?

A. Well, I think my opinion is that functionally the units in the middle, to have a corridor that's 40 or 50 feet long, would not be functionally good.

Q. Was that the option as you understood it at the time, to have a corridor down the middle if you were going to give direct access to those middle units?

A. We did not discuss putting a corridor down the middle.

Q. In fact, the fourth indicates that they don't want a corridor; does it not?

A. Well, what they're meaning there I think is common, they wanted individual entries, no, I took this to mean no common corridor. In other words, no one wants, they didn't want anybody sharing the corridor.

Q. By way of example, if I look at, again, I'm only, just to make sure we're all speaking the same language, if I look at Exhibit 86 which is this Bogaerts' design of the three-story 24-unit apartment, there's shown on the building plan an entry way that is effectively shared by four units; is that correct?

A. That's the way it appears, yes.

[114] Q. Is it your understanding they didn't want that where everybody would share the same entry to the building?

A. That is correct.

Q. So that's what you understand that comment to mean in four individual entries, no corridor, common access?

A. Correct.

Q. Did you, when you presented the drawing that is reflected as the fourth page of Tosch Exhibit 4, what comment did you receive from Mr. Friedman about the fact that there was no access to these flats in the middle?

A. At the time I presented it, I did not receive a decisive comment one way or another. He looked at it and we discussed it briefly and I gave him the concept for him to look at.

Q. Did he like or dislike this concept?

A. At the time he personally seemed to like it. I don't know who else internally was involved in the decision making.

Q. Did you have any discussions, without identifying prior clients or other clients, that you had done projects that had direct access from the garages to all of the units?

[115] A. I don't believe we had a discussion regarding that.

Q. I mean I understand, I'm just, that architects, like lawyers, like doctors have some obligations to keep confidential certain information. But I just want to make sure our questions are in common. The fact, I don't identify a client's name if somebody says have you done a wheel, have you done a this, I can say yeah, I've done that before without getting in to the specifics of it. So I'm not asking whether you specifically discussed with him Cross winds or Heritage or Stratford or any of those things. Did you have any general discussions in which you indicated that in some other context you had created a design that had direct access to all the units?

A. I don't believe we discussed that.

Q. Did he come back to you after seeing the design which is the fourth page of Exhibit 5 and ask you to look at a way to try to get direct access to all of the units?

A. At some later date yes.

Q. That some later date presumably is before June because I think we've indicated previously that that's when the drawings were submitted in Hampton Ridge that had the direct access in the twelve units?

[116] A. I believe that's correct.

Q. Did he tell you why he didn't want to go this way but rather wanted to go with direct access to all the units?

A. I believe it was based on what they thought the market there would need. That's somewhat speculative on my part.

Q. I'm asking did he indicate, did he state that in words or—

A. I don't recall.

Q. All right.

MR. CANTOR: Do you suppose we can take a recess for a couple minutes?

MR. WASINGER: That's fine.

(Recess).

Q. We're dealing again with Mr. Friedman's program. Now, again, number Tosch Exhibit 3 was this sketch by Bogaerts. And Tosch Exhibit 12 was this sketch that apparently was done by Progressive. Both of these are for ten-unit buildings; is that right?

A. I believe so.

Q. Did you have any discussion about whether you had permission to use Mr. Bogaerts' drawings as a basis for starting where you started?

A. I believe Mr. Friedman at our first meeting [117] indicated that Mr. Bogaerts had no problem with us picking up his concept and moving on from there.

Q. Did you ever talk to Mr. Bogaerts individually?

A. I did not.

Q. Did Mr. Friedman ever provide you with any writing that reflected that view?

A. Any excuse me?

Q. Any document or letter or memo that reflected that view?

A. No. I believe not.

Q. You just relied on what Mr. Friedman told you?

A. Yes.

Q. I'm not saying that's bad. That just kind of came out the wrong way. That was the reason why you relied on Mr. Friedman, went forward on that basis?

A. That's correct.

Q. Now, here's the next thing I want to ask you about. When we look at these drawings which are Tosch Exhibit 10, these are the preliminary entrance walk layouts for both a twelve-unit building and a ten-unit building, right?

A. Correct

Q. Now, is that your handwriting or is that [118] someone else's?

A. This is mine.

Q. So then it says based on a 5-19 site concept. Here's a question that I'm trying to understand about the first page, the twelve-unit building. There appeared to be these are sidewalks that reflect the entrance to a particular unit; is that right? I'm looking at the bottom portion of Exhibit 10, the first page, these little drawings that look like pipes to a lay person.

A. Yes.

Q. So there's one in the middle, this would be apparently the first floor unit, right?

A. Correct.

Q. Then there's one also on either the front or back that would go to what, one of the units upstairs?

A. Yes.

Q. Where does the unit have access? Is it over here in this area or did they share?

A. Let me think. Ultimately this sidewalk served two entrances.

Q. But at the time that you drew this in on apparently June 2nd, how did that guy get in to, mean was there an entry way somewhere other than in [119] the middle of the building? Does the question make sense to you. Was it ever thought that you'd have some other entry way to the unit over

the garage other than through the front of the building I guess is my question?

A. Yes.

Q. How were you going to do that?

A. A stairway.

Q. In the garage or where?

A. It would be separated from the garage.

Q. Something like what Balsamo did on their plan? Remember I showed you the Balsam where they had it at the end of the garage?

A. Something like that.

Q. Did that not happen? I mean well, let me say it another way. We know it didn't happen. Why didn't that happen?

A. It did happen, sir, on the twelve-unit building.

Q. No. Let's look at the twelve-unit building. This is again Whitcomb Exhibit 73. This is a composite first floor plan for the Chatterton twelve-unit building; is that not correct?

A. That's correct, sir.

Q. If I read this correctly, what has happened [120] there's an entry way from the outside on, adjacent to the garage but it's on the front of the building or back of the building as the case may be, right?

A. Correct.

Q. And then I guess what you describe as more in the middle of the building is two entry ways; one for the lower unit, then one has a stairwell going up to the other unit; is that correct?

A. That is correct.

Q. That isn't the way the entrance walk layout is reflected in the first page of Exhibit 10, is it?

A. Yes. I believe it is, sir.

Q. It is? You think this is the same thing?

A. I believe so.

Q. Okay. Maybe I misperceived so—was there any thought to having an entry way other than on the front of the building such as the design I showed you that Mr. Tosch had done for Heritage? Remember where there was an entry way on the side of the building?

A. Yes.

Q. Was there ever any thought to doing that at either Chatterton or Hampton Ridge?

A. I'm sure we thought about it.

Q. Did you discuss it with Mr. Friedman?

A. I don't believe so.

[121] Q. Did Mr. Friedman indicate his preference to have all the entry ways be on the front or back of the building?

A. I believe that's correct, he did.

Q. Did he explain why he had that preference?

A. No. Not specifically, no.

Q. Did he express it generally?

A. I don't recall.

Q. When there were discussions about the market demands for the way these units ultimately were created, are you following what I'm saying thus far?

A. Yes.

Q. Did they indicate what that market was?

A. No.

Q. Did you have any understanding at the time that you were drawing these drawings as to who was building buildings that had this side garage with the twelve-unit concept?

A. Other than Cross Winds Communities, no.

Q. Did they reference the Cross Winds project?

A. They being selective?

Q. Yes, sir.

A. No.

Q. Did they give you any indication as to where they thought this market demand was created?

[122] A. I'm not sure I understand.

Q. Did they give you any indication where they thought that's what the market would demand?

A. No.

Q. I take it at this point the Cross Winds buildings, and we're talking now spring of 2000, Cross Wind buildings weren't under construction yet?

A. Based on the dates that you had showed me on the plans, I would think they were getting ready but probably not.

Q. Were they marketing, was Cross Winds marketing in the spring of 2000?

A. I don't know.

Q. Did you ever, I thought your answer was and if I'm mistaken, please correct it. I thought your answer was that you had no conversations with Mr. Friedman, Mr. cantor or others from selective about the waterford Township project that cross winds was developing?

A. That is correct, I had no conversation.

Q. Did Mr. Tosch report to you on any conversations where the selective people discussed with him the Waterford Township project?

A. He did not tell me that he had any discussions regarding that.

[123] Q. So as you sit here today, you have no reason to believe that the selective people were even aware of the Waterford Township project?

A. That's correct.

Q. Tosch Exhibit 15 is another drawing I think that—is this something you did as well?

A. Yes, sir.

Q. And this is a situation where again we have a middle, are these flats now we're talking about? There's a second floor flat and a first floor flat?

A. Correct.

Q. Entered through separate doorways in the middle of the unit, so they would not have the same doorway. The first

floor flat would not have the same doorway as the second floor flat; is that correct?

A. That is correct, sir.

Q. And at this point, is it correct that we now have a fireplace in the living room on the front of the building or that we have a fireplace in the living room in the front of the building?

A. No.

Q. What is that drawing there?

A. That's the entrance way to the lower dwelling and a coat closet.

Q. I see.

[124] A. Adjacent to it.

Q. That just shows you how smart I am. But anyway, you have an entry way to the living room on the first floor unit, two entry ways in the middle of the building to the flats, one with a stairway, one without, then you have direct access from the middle garages to the two lower level units and then stairways to the two upper level units that are not flats; is that right?

A. That is correct, sir.

Q. Now, on Page 4 of this document which is Tosch Exhibit 15, there's a reference out here with some dotted lines adjacent to the garages. What's going on there? Looks like there's now, is that talking about expanding out to six garages?

A. That's potentially putting a garage, we have still a ten-unit building here. Though these are townhouses that face, and this was trying to illustrate to them that the location of the garages for these two units could optionally be in any one of four locations. They could both be here, you know, they could be opposite like this, they could both be on one side, they could both be here, go like this, they could be there and go like that, they could both be here, go like that, depending on site constraints.

[125] Q. So what if I, to say in layman's language there are four kind of dotted line things at the ends of, on the corners of this building which is intended to be a ten-unit building?

A. That's correct.

Q. What you're saying is you could pick and choose as among those four dotted line areas as to which two of those four you would use as garages for the town homes in the middle; is that right?

A_ Correct. Or none.

Q. Or none. what response did you get to that proposal; if you remember?

A. Again, you know, we discussed the proposal and Mr. Friedman would agree that yeah, this looks reasonable and then he'd take them and, you know, I'd leave and apparently discuss it with his project team.

Q. If I look at the last page of Exhibit 15, is this now the second floor of that building or is this the first floor still?

A. No, this would be the second floor.

Q. So what this is showing in the jagged or the whatever they call it, the broken lines is space that is not utilized for living, this is just dead space shall we say?

A. Yes.

[126] Q. And we still have the ten-unit building?

A. Correct.

Q. Was there a discussion in the context of this drawing about squaring this up so you could turn this dead space in to a living unit?

A. In the context of this?

Q. Yes.

A. At the time I presented this, I don't believe we had a discussion relative to that.

Q. But I take it if I looked at your two drawings which are the second and last, the second to the last and last page of Exhibit 15, it would be easy to make six garages rather than five, and then the question is what do you do with the space above the garage; is that right?

A. Yes.

Q. I take it if you square it off, you have more space than if you have a non-square; is that right?

A. Depending on where you square it off at, yes.

Q. Now, I'm going to direct your attention to the exhibit which is 18. Actually I don't want to do that. Sorry, if I look at Exhibit 21, what am I seeing there? This is now a second floor where you're going [127] to have a living unit, a single living unit over the garage?

A. Yes.

Q. How did this come about?

A. This is another variation of a ten-unit building without having the units in the middle there that did not have direct access.

Q. So you're trying to solve the problem of giving the extra unit a direct access by moving the other units inside and then putting, instead of having the middle flat, moving it out over the garage?

A. Correct.

Q. How did that concept fly?

A. Again, I presented it to Mr. Friedman and he was not averse to it, he said it looked okay. Again, I left, he presented it to his team I assume.

Q. Came back, he didn't like this?

A. Ultimately that's not what we did.

Q. Did he explain why he didn't like this because now you have ten units all with access, direct access to the garage?

A. He didn't explain why, no.

Q. Did you ask?

A. Well, I think the thing was at some point they decide twelve-unit, they wanted to do twelve-unit [128] buildings.

Q. Here's a question that is not intended to, mean it's an ignorance of your profession I guess. But as you're going through these iterations of these drawings, and you're being asked to go back to the drawings boards, I mean is there a point in your profession where you say like what do you want

that I'm not doing and try to figure out how you can solve the problem without kind of spinning your wheels as much?

A. Wll, to be candid with you, if we're working on a time and materials basis with our client, we'll do as many renditions as they want.

Q. Is there a point in which you say how can I—what's wrong with this, what do you really want that I'm not doing so I can try to do it better the next time?

A. There may be a point in time when that happens.

Q. In this case, though, they would just say try something different, you go back, do something different; is that right?

A. Yes.

Q. You just at some point came to understand that this concept of having a living unit out over the [129] garage in a ten-unit building wouldn't work for whatever they were trying to achieve?

A. They made that decision, not myself.

Q. You came to understand that they told you that?

A. Correct.

Q. You think it was Mr. Friedman?

A. I believe so.

Q. But to your recollection, he didn't tell you why?

A. No.

Q. Did you at some point come to learn that they were trying to solve a density problem with Canton Township?

A. I believe ultimately that's what was driving this.

Q. The density?

A. Reiterations.

Q. I think I showed you, I know I showed you the exhibit that was the 24-unit apartments that had no garages that we marked as Exhibit 86. Did you come to understand whether Canton Township had rejected the concept of a three-story apartment out there?

A. I don't believe that was ever brought to my direct attention.

[130] Q. Now, I'm going to direct your attention to a first floor plan for a twelve-plex, Selective, that appears to have a date of June 8, 2000. It's been marked as Tosch Exhibit 24. I'm going to pull it out actually so we can go through it page by page. Have you seen these drawings before, sir?

A. Yes.

Q. Are those your drawings?

A. Yes.

Q. And at this point now this is what we call a quarter of a twelve-plex building?

A. One quarter, yes.

Q. It has a living unit, I'm referring to the first page, Exhibit 24, it has a living unit on the first floor that has separated bedrooms, right?

A. Correct.

Q. Direct access to this garage that's denominated G-1; is that right?

A. Correct.

Q. So that means garage one that goes with unit one, right?

A. That's correct.

Q. Then stairways up to the upper units?

A. That is correct.

Q. Does this one have a fireplace or not have [131] a fireplace?

A. It does, sir.

Q. Is the fireplace shown on the lower part of the living room as we're looking at Exhibit 24?

A. Yes, sir.

Q. Then we go the second page of Exhibit 24 is now the second floor plan; is that correct?

A. Yes, sir.

Q. We have a two and a circle, that refers to unit two?

A. Yes.

Q. That's then associated with garage two; is that right, G-2 here?

A. That is correct.

Q. Then we have a three, I take it this would be over the three garages and that's associated with garage three; is that correct?

A. That is correct.

Q. Again, we have an arrangement that reflects the stairs coming up in this area here, is that right, on what I would describe the left-hand side of the unit over the garage, unit three?

A. That's correct.

Q. Now, is this what ultimately became the basis for the plan that you drew for Hampton Ridge and [132] Chatterton?

A. This eventually became through evolution, yes.

Q. Why were these units designated the way they're designated, G-1, G-3, G-2 and the units one, two, three?

A. Because it's logical to start with giving a unit either a number or a letter and we chose numbers. And then it was logical to associate the garage with that particular number so that one could follow which garage went with which unit.

Q. Did there come a time where the units changed from one, two, three to A, B, C?

A. I think there was a time.

Q. Do you know what accounted for that change?

A. Do I know what, sir?

Q. DO you know what accounted for the change from the one, two, three to the A, B, C?

A. Generally in our construction drawings at Progressive Associates we've used letters for the construction drawing, designation of dwellings starting with the letter A, so on.

Q. Starting with the letter A?

A. Starting with the letter A for the logical reason.

[133] Q. I take it if you would use in your logical reasons this would be, the outer unit would be A, the second garage unit would be C, and then the internal one would be B if you change—

A. What we did, what was known as one, two and three became A, B, C.

Q. So you would have A on the exterior, B on the interior, and C in the middle; is that right?

A. Based on this, yes.

Q. Now, what is this note on—is this your handwriting? I'm referring to the page that has a Chip kind of note on it?

A. Yes.

Q. What is that? What are you asking him at that point?

A. Chip was working on the site planning portion of the project for Selective and we added this deck here or I was making this, the fact that there was a deck obvious to Chip, I was asking him would the columns for the deck be a problem meaning regarding the building required setbacks and distance between buildings and so on.

Q. Why was it, who had the idea to add the deck?

A. I don't remember whether we put it on there [134] or that was a requirement of selective.

Q. Now, this quarter of a building is 84 feet long; is that right?

A. Yes. I believe that's what it says.

Q. That would mean the whole building would be approximately 168 feet long?

A. Yes.

Q. Why is it that size?

A. It's a function of laying out all the spaces based on the requirements that the client desires for the size of the rooms, the amount of storage, the garages, et cetera, and adding these all up and coming out to an approximate number.

Q. Is it your understanding what came first is the room size and the building size later or did the building size come first and the room sizes later?

A. Generally the room sizes come first and determines the building size. However, in some instances, there's ordinances that restrict the length of a building in which case you have to be cognizant of both, work the two.

Q. My question is in this case, do you know whether there were restrictions imposed by Canton Township which influenced building size or did the building size, was the building size simply a product [135] of the room sizes?

A. I believe there was a restriction in the ordinance, but I also recollect that this being a planned unit development, that we weren't necessarily restricted by that, but we had to be aware of it.

Q. Were you advised by Selective that the density issues influenced the size of the building, that is to say how many buildings you could get on the site depended on the size of the building?

A. I don't think they brought that to our attention, but it's obvious, right.

Q. Do you know whether they had previously had an understanding of what size, I mean what the densities would be allowed by Canton Township, the maximum densities?

A. I'm sorry?

Q. Did they provide you with any information from Canton Township as to the maximum densities that Canton Township would allow?

A. I believe they did verbally.

Q. Was it your, were you attempting to find a way to maximize the densities so you utilized all the density that Canton Township would allow?

A. I believe that's ultimately what Selective did, yes.

[136] Q. That would have been a direction from them, however?

A. Correct.

Q. I take it from your perspective, it would not have mattered whether you made these bedrooms twelve feet or fourteen feet or eleven by twelve?

A. Exactly.

Q. I want to show you something, again, this is now Exhibit 25 and this is a June 11, 2001 document from a

Robert Corbin of the selective Group to yourself. Have you seen that E-mail before?

A. Yes, sir, I believe I have seen this fax.

Q. That is a direction I take it from Mr. Corbin to move forward with Chatterton, we're talking June 11, 2001; are we not?

A. Yes. It appears to.

Q. Do you know why Chatterton kind of didn't start until June of 2001 when you were originally having discussions in March of 2000?

A. My understanding was they were having, site plan approval process was moving on and they weren't exactly sure what would be approved. So they didn't want to invest money in us preparing plans, not knowing if more changes would be necessitated.

Q. And was that understanding based on [137] something someone told you at selective?

A. I believe, yes, it was.

Q. Who was that person that would have told you that?

A. That would have either been Steve Friedman or Glen Cantor, I believe.

Q. Now, had you dealt with this Mr. Corbin before June of 2001?

A. I don't recall exactly when I started dealing with Mr. Corbin.

Q. Is the reason that you made the submittals and proceeded with Hampton Ridge because Genoa Township had given approval before Canton Township; is that what you understand the reason why one went ahead first rather than the other?

A. That was my understanding.

Q. Was there any other reason communicated to you as to why Hampton started before Chatterton?

A. Not to me, no.

Q. Moving right along here. Can you tell me what Exhibit 27 is?

A. This is a floor plan for a two-story building having six units with attached garages.

Q. Is this a Chatterton floor plan or is this for some other project?

[138] A. I don't believe—I'm sorry, I don't believe that's a chatterton floor plan, no.

Q. Who prepared this?

A. Progressive Associates.

Q. For whom?

A. I'm not sure.

Q. The, where are the garages in this thing?

A. The garages are on the ends.

Q. I count four. Am I missing something?

A. One, two, three, four, then there's garages here.

Q. I see.

A. Five, six.

Q. That's what I was missing. so the, what you have in that situation is two garages on the ends then two garages in the middle which would be the back of the building, is that right, or is this the front of the building?

A. I would, my opinion I'd call this the back of the building.

Q. Because I guess it looks like the entrance *is* on the front?

A. Correct.

Q. And then upstairs what do we have, the middle units which are the C units. Are those[139] townhouses?

A. Yes.

Q. So we have four what are those, ranch? No, those are townhouses as well; are they not?

A. Basically.

Q. The A's, all of these are townhouses; is that right?

A. Yes.

Q. But the A's are larger because of the way that the second floor is set up?

A. Correct.

Q. So you have two bedrooms upstairs, what are these other rooms upstairs here or what is that other room?

A. This would be the living room and a dining area.

Q. Is this like a cathedral ceiling?

A. Yes.

Q. Do you know whether that was discussed with Progressive, excuse me, with Selective?

A. I don't believe it was.

Q. Why?

A. Why?

Q. Is there a reason why you didn't make that proposal? I'm curious. First of all, I would suggest [140] to you, maybe wrongly, that this was produced during Mr. Tosch's deposition and was in connection with this lawsuit, but that doesn't necessarily mean anything. But is there a reason this didn't solve the selective criteria as described in that program that Mr. Friedman which is Exhibit, what, 69? I mean the drawing which has been marked as Exhibit 27 would satisfy Mr. Friedman's criteria; would it not?

A. I don't believe it would, sir.

Q. Why is that, because of the ends of the building?

A. Well, here it says eight and twelve-unit buildings.

Q- Right.

A. This would be a six-unit building.

Q. You're right. I'm sorry.

A. And I think somewhere in here it talks about garages on the ends which we had garages additionally, two additionally on the ends and in the back.

Q. You're right. I'm sorry. I had forgotten about that. I misspoke. I apologize. Let me show you, maybe this will help clear it up a little bit for me. I want to show you something else I don't quite understand. This has been marked as Exhibit 28, it's [141] called parking study, Chatterton Apartments. Can you tell me what that's all about?

A. Well, yeah. Apparently we were, Selective was also considering what we call a through unit in that the units are

not back to back but they are side to side so that each dwelling unit has front and rear exposure. And we were looking at parking, ways of creating parking as close to the entrances to the dwellings as possible.

Q. I take it none of those had garages?

A. I believe that is correct.

Q. Which means you need more parking spaces take it to satisfy whatever your requirements, you need, does that mean you need 29 parking spaces for each twelve-unit building; is that what that's saying?

A. That's what this says, yes.

Q. Is that a municipal requirement or code requirement or just good practice requirement?

A. That's probably the municipal's zoning ordinance requirement.

Q. Is there a reason why this kind of design concept wasn't, I mean wasn't ultimately used?

A_ I'm sure there's, that would be Selective's, you know, decision.

Q. Did they explain to you why they didn't [142] want to go to this through unit concept?

A. They probably did, but I don't know that I remember.

Q. That's fine. Now, help me out with another document which is marked as Exhibit 30. I don't know if these two go together or not, but they were marked together. This says conceptual first floor plan, conceptual second floor plan. Do those go together?

A. I believe they do, but these are not Progressive Associates' documents.

Q. They aren't?

A. No, sir.

Q. Had you seen those before this deposition?

A. Yes.

Q. Who did those?

A. I believe this was produced by Alexander Bogaerts.

Q. This is when you were talking about when you indicated you had seen some concepts from Bogaerts?

A. Correct.

Q. And that would have been in your early meetings with Mr. Friedman?

A. Correct.

Q. So what we have in this situation is what, [143] five garages; is that right?

A. That's correct.

Q. And then we have another, is this another garage over here?

A. Yes.

Q. So we have six garages basically?

A. No, sir.

Q. Five. I'm sorry, this is two. We have a garage on the front, four garages on the side, are these back to back ranches, we call them unit four and five ranch units looks like it, doesn't it.

A. Yes, it appears that four and five are one-story dwellings.

Q. Then you have an entry in the front of the building which takes you, takes you up to how do you get to unit three? I don't understand how you get to unit three?

A. Is that three?

Q. Is that one of these stairways?

A. That looks like unit three, but it doesn't show a stairway.

Q. But it looks like there's a stairway down here; is that right?

A. This would generally indicate a stairway is there, yes.

[144] Q. Was there, did you discuss whether this would be something they would want to do or is there, did they explain why they didn't want to do this?

A. I think what they were looking for, you know, this had a garage still in the front or in the back or both. And they presented this, said this is kind of what or this is what

Alexander Bogaerts had done, but we think their requirement was that the parking be on the ends, and asked us to pick it up from there, see what we could do.

Q. As I understand the note here on this first floor plan for 30, it says unit number three is the only unit without direct access. Is that how you read that note, the garage, we're talking about the garage for unit number three?

A. I believe that is what it's indicating, sir.

Q. The guy that has apartment unit three, which is a second-story unit, has to walk out of his garage around to the front of the building up the stairway?

A. I would assume that to be the case, yes.

Q. Did they indicate any reason why they didn't want the garage in the front of the building?

A. To my recollection of that was that they [145] were again concerned about a traditional look where garages were on the, not visible on the street scape let's say.

Q. Was there a density issue in the sense that you would have to have more space for driveways and such if you had it on the front of the building?

A. I'm sure that's an issue. I don't remember discussing it, but it's kind of an obvious issue to a developer type.

Q. Now, aren't there a lot of these more traditional buildings, if you look, like I was down at Disney, what's that new community, their celebration?

A. Yes.

Q. Aren't there a lot of those more traditional looks that do have the garages on the front of the buildings? Do you know what I'm talking about, the row housey kind of look with the garages?

A. Yes. Actually I was at celebration a few years ago, and my recollection of that was that the more what is called a traditional neighborhood development, seemed to me that a lot of those garages were hidden more in the back.

Q. Like your old Detroit neighborhoods on the East side where you have the garages in the back?

A. Kind of an alley access. Though I do, there [146] are some front loaded garages at Celebration.

Q. My point is you understood that this was just not the look they were looking for, they wanted—I mean I'm back to the Bogaerts' sketches which are Exhibit 30. They didn't want the garage, they wanted the cleaner look so to speak?

A. That was my understanding, sir.

Q. Okay. Thank you. Had you, do you remember that an the project that you had done over in, when I say you, I mean Progressive, the project you had done over in Sterling Heights, one of the garages was out in front of the building for Adco, you had five garages along the side, you had one that kind of—it's a little different layout, but it was basically a situation where if you take your—go back here a minute. Just to illustrate this. If you take your six-unit building like you have at Hampton Ridge, this is Hampton Ridge. This building, this garage actually opened out to the front, was in this line but it opened out to the front. Do you recall that design?

A. I don't specifically recall that, but could see that happening because of site constraints and making some variation in the building of—

Q. Do you have any idea why these units suddenly became C, B, A going kind of backwards this [147] way?

A. Again, it has to do with the garage for unit A, A being the first floor, the garage for unit B being the second floor, and the garage for unit C being the second floor unit.

Q. But if I remember your drawing that had the one, two, three that wasn't quite the way it was. One was the first floor, right?

A. Right.

Q. And then three was in the middle, and then two was on the side?

A. Two being what ultimately became B. You know, what happened here is these got—

Q. Flipped. That's why I'm asking you.

A. It's just a typo error on my part labeling them. This garage really went to the second floor dwelling above the number one, and this garage goes to the one above the garage. I just—

Q. I guess that just pushes the question off. Do you know why it was done in this way, C, B, A as opposed to some other way I mean?

A. It's a function of how can you get access from a garage to the dwelling based on everything else that has to happen within a dwelling.

MR. CANTOR: What exhibit number was [148] that, please?

MR. WASINGER: 32.

MR. CANTOR: Thank you.

Q. Now, again, I'm just going to beat this horse to death one more time. This is the, what we think to be the Balsamo design, right?

A. I believe so.

Q. You don't recall any discussion with the people at selective about moving this stairway out to the end of the building?

A. I personally don't recall such a discussion.

MR. WASINGER: Let me take a quick break. I think we're pretty much done.

(Recess).

Q. Couple things I want to make sure we don't miss here. Back to the program that you received which has been marked as Exhibit 69.

A. Uh-huh.

Q. This references square footages of various units, and I take it you never actually ever did a three bedroom, did you?

A. I believe one of the early concepts that we had looked through presented a potential two bedroom with den or three bedroom, whatever you wanted to call [149] it.

Q. Is that reflected in Exhibit 15 here?

A. No, not there.

Q. That's all right. I'll find it. I just—but ultimately the three bedroom wasn't done; is that right?

A. That is correct.

Q. Was there some explanation for why the three bedroom wasn't done?

A. No. I mean that's what Selective decided.

Q. They didn't explain to you why?

A. No.

Q. Did you, did they explain to you how they had come upon the square footages for these apartments?

A. No, they did not, sir.

Q. Did you ever ask them?

A. No.

Q. Now, I want to direct your attention to what has been marked as Tosch Exhibit 7. This is the letter that you wrote to Mr. Friedman in August dated August 1, 2000 that became the contract when it was signed; is that right?

A. That is correct.

Q. And that was for the, what you called Fox [150] Run which they called Hampton Ridge, correct?

A. Correct.

Q. Was there a similar contract done for chatterton?

A. I believe there was.

Q. Was it a written contract like that?

A. I believe it was.

Q. As regards to that contract, the August 1, 2000 contract, Exhibit 7, has Progressive done all the things that are supposed to be done under that contract? Is there anything left to be done said another way?

A. I believe we have, we have done all the things in conjunction with the exception that shop

drawing review would be done when the contractor submits shop drawings to us. I don't believe they submitted shop drawings.

Q. But you've done everything you've been asked to do?

A. That's correct.

Q. They didn't ask you to do shop drawing review in reality?

A. That's correct.

Q. Have you been paid all the monies you're entitled to be paid under this contract to your [151] knowledge?

A. I'm not sure, sir. I don't know.

Q. Have you been paid all the monies you're entitled to be made on the Chatterton?

A. Again, I'm not sure of that.

Q. Do you have, is there anything on Chatterton which you haven't yet done as you understand your contract?

A. Is there anything we haven't done? I believe not.

Q. And I take it they're not seeking your review of shop drawings on the Chatterton buildings either?

A. So far we received no request to review shop drawings.

Q. Okay. Now, last but not least, I'm going to show you what has been marked as Stapleton Exhibit 43. It's an overlay of Aberdeen with Hampton Ridge. Have you seen that document before?

A. I've seen something similar to this before.

Q. When did you see something similar to that?

A. Couple days ago.

Q. In what context?

A. Mr. Healy showed me something similar to this.

[152] Q. Can I have that back a second?

A. Yes.

Q. Prior to seeing this document, this overlay that is Exhibit 43, had you seen any of the either elevations or floor plans for any of the Aberdeen projects?

A. Prior to seeing that?

Q. Yes, sir.

A. Yes.

Q. When did you first see an Aberdeen layout?

A. In Mr. Healy's conference room probably a month ago.

Q. Had you seen anything prior to this lawsuit, an Aberdeen layout or floor plan?

A. No, sir.

Q. I'm going to show you what has been marked as Exhibit 54 in the deposition of Mr. Stapleton, and it's a brochure for Aberdeen Pines. Have you seen any brochures of that type?

A. No, sir.

Q. Have you seen the brochures that selective is using to sell its Hampton Ridge or Chatterton projects?

A. I have not.

Q. I'm going to show you one just to make sure [153] we're on the same wavelength. I'm going to show you what has been marked as Exhibit 41 in Mr. Stapleton's deposition. This is their Hampton Ridge building. You've not seen that before I take it?

A. That is correct.

Q. I'm going—may I have that back a second? I'm going to show you what has been previously marked as Exhibit 42 in Mr. stapleton's deposition. Have you seen that document before?

MR. CANTOR: may I see that over your shoulder, please? I'm going to object to the use of this in questioning the witness. The Aberdeen drawing here is not the one at issue and the Oakmonte drawing was made in the last year, even since Hampton has been made. This is a phony set of drawings.

MR. WASINGER: You can object all day long and I don't want to get in to an argument since we radically disagree about what is at issue or not.

MR. CANTOR: You supplied me with Oakmonte drawings which is subsequent to the making of the drawings that are at issue in this suit. That is, in my opinion, dishonest.

MR. WASINGER: You know who's dishonest and who's being—when you accuse me of [154] dishonesty in light of your behavior and in light of your absolute refusal to open your eyes to what is, in fact, being alleged in this lawsuit, I consider that insulting, in violation of the civility code. If you want to object, give a non-speaking objection. If you want to get in to an argument about what's at issue, open your eyes, start thinking and hearing what we're really saying rather than what you've chosen to close your eyes to. Don't start accusing me of dishonesty under the circumstances of this case where your behavior has been despicable.

MR. CANTOR: I move to strike any testimony concerning the Oakmonte and the upper Aberdeen drawing. Those drawings are not timely. They were made after the accusation drawings in this case were made. And the Oakmonte was copyrighted, in fact, according to the copyright you sent me, by somebody else, not even the plaintiffs.

MR. WASINGER: You know what, Mr. Cantor, you've been doing this for a long time. You are either willfully ignorant or you are simply seeking to be obstreperous. As you yourself are aware, there's a concept of derivative work which you have chosen to ignore and disorient—I'm not going to get in to any other arguments.

[155] Q. Have you seen that exhibit before, sir?

A. I don't believe so.

Q. Have you seen the project which is reflected as Oakmonte on that drawing at any time before this?

A. You mean physically seen it in reality?

Q. That's number one.

A. No.

Q. Have you seen advertisements for the Oakmonte project?

A. No, sir.

Q. Do you review the real estate sections of the newspaper?

A. Extremely seldom.

Q. Thank you. Now, have you been asked to compare the differences between the Hampton Ridge and the Aberdeen plans that we showed you on Exhibit 47?

A. Asked by—

Q. Anyone. Have you made an attempt to compare the Aberdeen and the Hampton Ridge plans?

A. Not in any earnest.

Q. When you reviewed these documents in Mr. Healy's office, did you notice any differences in the floor plans that were significant to your mind?

A. Yes.

[156] Q. What were those? Let's start with the Aberdeen. what is, let's have Aberdeen and Hampton. Tell me what you believe to be significant differences?

A. Well, the first thing i recall was we had looked at an actual construction drawing that had dimensions on it.

Q. So you think the dimensions—

A. It seems to me our building was approximately 15 foot longer than the Aberdeen building.

Q. So you think that one of the issues would be your building is what, 15 over one hundred—yours is about 168, theirs is about 153; is that right?

A. I know ours is about 168, if I'm right about 15, you're correct.

Q. That would be a difference?

A. That would be a difference.

Q. Okay. You think that's a big difference or little difference?

A. Well, it could be a big difference in the amount of square footage in the building.

MR. HEALY: I guess the only objection or clarification that I would make if you're asking him to, that his testimony would be in relation [157] to differences, that may be illustrated in making a comparison of Exhibit 43 with—

MR. WASINGER: I'll do it either way you want to do it.

MR. HEALY: As opposed to construction drawings.

Q. I'm addressing your attention at the present time to layouts generally. We can go in to whatever level of detail you want. But let s deal on the big picture first which is the layouts.

A. Okay.

Q. You would agree i take it—let's go through it. You would agree that they each have six garages on the ends?

A. Yes.

Q. And you would agree that there are four dwelling units on the first floor of each?

A. Yes.

Q. They each have the chimney and fireplace in approximately the same location?

A. That is correct.

Q. They each have bedrooms on either side of a living room, we're speaking of the first floor dwellings at the present time?

A. That is correct.

[158] Q. They each have bathrooms in approximately the same location as regards to those bedrooms?

A. Yes.

Q. The kitchens are located in approximately the same locations?

A. Generally.

Q. And the entry ways to each of the apartments is generally in the same location; is that correct?

A. This has recessed, both.

Q. Excuse me, from the garages, let me just, mean I misspoke. That the garage entries to those units are in approximately the same location?

A. With the exception of the fact we have larger stairways and—

Q. But the location—

A. —storage areas and that.

Q. Those larger stairways and storage areas you explained in significant part where your building is larger than their building; is that right?

A. It may. I don't know if that's the only reason.

Q. In fact, if we look at the garages in the Aberdeen, excuse me, the stairways in Aberdeen village, they're significantly narrower than the [159] stairways and storage areas, there is no storage areas in the Aberdeen village plan, is that right, that you can see visibly?

A. Well, I see some things here. I don't know what those are.

Q. Those are in the two units that don't have—all right. Now, if we look at the second floor, the apartments, there's now six units on the second floor; is that correct?

A. That is correct, sir.

Q. Apartments over each of the three sets of garages on the first floor?

A. Yes.

Q. Bedrooms approximately the same location?

A. In the carriage apartments, yes.

Q. And similarly so in the internal apartments?

A. Appears that way, yes.

Q. And again, the chimneys in the living room, right?

A. Yes.

Q. Bathrooms in approximately the same location? I mean, when I say approximately they're in the same locations, they may be slightly different in size but they're in the

corner where the units come [160] together in what we might call the cross of the building?

MR. HEALY: I'll object to the compound question.

Q. Well, all right. The building is divided in four parts, right?

A. Correct.

Q. And I don't know, what do you call that in architectural terms, this division of the building in to four parts?

A. A dwelling separation.

Q. And the bathrooms are located on the dwelling separation lines in the second floor, right?

A. That is correct.

Q. Also on the first floor?

A. That is correct.

Q. Now, other than details relating to kitchen, how the kitchen might be laid out or the size of the buildings, are there other significant, are there any significant variations you see in the arrangement of these buildings?

A. Yes.

Q. What are they?

A. I see a much greater offset in the front. I don't see a recessed entrance.

[161] MR. CANTOR: which one is that, please? Can you give us the number so we know which one you're talking about?

THE WITNESS: This is Exhibit 43. This is the same as this.

Q. Basically. Look at the overlay.

A. That's easier to look at.

Q. I'll give you Exhibit 44 which is a reversal of the overlay where the Aberdeen is on the bottom and the Hampton Ridge is on the top. So for purposes of the record, Exhibit 44 is the Aberdeen white sheet and Exhibit 43 is the Hampton Ridge white sheet.

A. The master bedroom appears to be smaller in the Hampton than in the Aberdeen. The closet, bathroom arrangement, they have the closet on the, projecting in to the dining room, we have the closet more in the bedroom up against the unit separation wall. We have an alcove that recesses the entrance to the bedroom versus it on the flat wall. we have porches with columns. I think I already mentioned that our dwelling unit entrances are not recessed, theirs are. Our stairway appears to be of a different design. They're walking up numerous risers to get to the landing whereas we're walking up only a couple [162] risers.

Q. Why do you say they're numerous, they're both two; are they not?

A. I see one, two, three, four, five, probably six. You're halfway when you get to their landing, you're only a couple steps when you get to our landing.

Q. You have more steps after the landing than they do?

A. That's correct.

Q. Stairs. All right.

A. They have this wider space outside of the kitchen that's, I'm not sure what the use of that might be. Our kitchen is bigger. The arrangement of the second bathroom is, ours is more of atypical arrangement, what i would call different design than theirs.

Q. You're referring to the way that the tub and shower are located basically?

A. Yeah. It looks like their door opens up, it would actually hit the water closet whereas ours is more of a typical, I mean this bathroom you see in virtually hundreds of designs. We have a large pantry as you enter off the kitchen. I don't see a pantry there.

[163] MR. HEALY: For Aberdeen?

THE WITNESS: For Aberdeen, excuse me.

Q. Where is your laundry?

A. Our laundry is at the extreme end as you walk in from the garage similar to a typical single-family home.

Q. Where?

A. Walk right in to the laundry area.

Q. We're talking on the first floor; are we not?

A. Yes, we are.

Q. That's in that area, that's the storage area of the expanded space of what appears to be the expanded space on the Hampton Ridge; is that right?

A. That could be. Then our furnace room is in between the laundry and the pantry. I don't know what this little room is here in Aberdeen that they have in the garage, whether that's some storage or whatever. Our foyers for each of the entrances off of the garage are much more spacious, we offer a large closet where you could put golf clubs, Christmas trees, things that you use, you know, sparingly whereas I don't see that there.

Q. So yours is an improvement in that respect?

[164] A. It's different. Whether some people might think it's an improvement, some people, depending on what you're looking for, might not.

MR. HEALY: The question is differences?

THE WITNESS: Yes.

MR. WASINGER: I'm asking another question.

MR. HEALY: Well, he's not finished.

MR. WASINGER: Well, don't point at stuff. You'll have your chance for questions.

A. The front, well the front facade part of the garages in ours is flat, they have this projected area. They have a deeper, it appears a balcony with a sliding glass door that enters, ours is a, we don't, we have a French door on a narrower balcony. The upper B unit, that would be directly above the A, again, the, basically the same differences that are below because

these units are mirrors. They have this large recess in the front which I think is in conjunction with their entrance way, that ours is more of a straight facade without a closet at that point.

Again, the bathrooms, the bathroom and closet and entrance to the master bedroom at the second floor is of a different nature. Ours does not [165] project in to the living, in to the dining room. French door leading to a narrower balcony than what's on Aberdeen. Kitchen, kitchens are different. Bathrooms are different.

Q. Different in the way that the space is laid out?

A. The space is laid out. Their bedroom number two looks to be longer, I would guess it has a longer dimension to width, ours is more square.

MR. HEALY: When you say theirs, you're referring to—

THE WITNESS: Aberdeen is more rectangular.

MR. HEALY: when you say ours, you're referring to—

THE WITNESS: Ours, I'm referring to Hampton Ridge. On the C unit when you walk up, we have a large storage closet, walk-in type closet, they have a very small closet. The living room has this area that overlooks the foyer where this wall is half wall and it's all open, so the room looks much larger whereas I see solid wall.

MR. HEALY: Where?

THE WITNESS: On the Aberdeen plan.

Q. Foyer you were talking about where the [166] stair comes up, yours is open so you see the stair down; is that what you're saying?

A. We have a larger foyer to begin with at the entrance, then our, we have like a short wall that allows you to visually see that space and create more of a volume. Our balcony is in

a different location. We only have access from the living room. They have access from the bedroom and living room, they being Aberdeen. Aberdeen has this additional offset in the front where the balcony is kind of set in whereas the Hampton Ridge job, the balcony is projected out in front of a flat wall. Aberdeen has what I would call a galley kitchen where we have an L-shaped kitchen with a peninsula and an individual pantry. It looks like their dining area, living room wall has a kink in it.

MR. LALONE: Who's they?

THE WITNESS: Aberdeen, I'm sorry. Aberdeen has an offset here in this wall somehow or we're straight, flat. Our Hampton Ridge master bedroom has his and her closets in separate locations. The Hampton Ridge master bedroom looks to be smaller. The Aberdeen has a single closet. The exterior envelope of the Hampton Ridge appears to be different in that the master bedroom is projected out beyond the exterior [167] wall below.

Q. How much do you think that projection out is, couple of inches?

A. No. It's probably a foot. I don't recall what the number is.

Q. Okay. It's not real big though?

A. It's restricted by the amount of, that wood floor truss systems cantilever which is one to two feet depending on all the different criteria in the loads. We show a vaulted what I would call a tray ceiling in this area. I don't know if they indicated anything, but I don't see that there.

MR. HEALY: Where?

THE WITNESS: In the Aberdeen. This appears to be, I would guess this dotted line means that this is a study, a two-way study whereas we have a four-way kind of interior hip, we being Hampton Ridge. Off the cuff, I guess in a five-

minute look at small scale drawings, I'd have to look at the construction drawings to point out more.

Q. I'm sure that you probably use different light switches, don't you think? Anyway, did you, have you, have you, were you asked at Mr. Healy's office to look at the elevations to see the extent to which the elevations are the same or different?

[168] A. I believe we did look at the elevations, yes.

Q. By the way, let me ask you a question that i guess is—did you use any of the work you had, done or any of the concepts you had done at Heritage in drawing up your plans for Hampton Ridge and Chatterton?

A. Any of the concepts?

Q. Well, I mean did you—you had two separate owners, therefore, I assume you had two separate kinds of ultimate determinations as to what people wanted in terms of closet sizes or whether the door goes this way or that way. Did you use in any way the Heritage drawings as a basis for the Hampton Ridge or Chatterton drawings?

A. Not physically I mean, but we as architects, we draw on our experience, past experiences to provide our services. so every day draw on what I've learned from the day and the year and the years before.

Q. I take it that, and in this particular case I think we've established you were kind of working on both of these simultaneously, within months of each other?

A. That's kind of what the dates imply. I [169] don't remember them going simultaneously. I was of the opinion we had basically finished Heritage.

Q. Would you agree that the, again, from a layout perspective, the division of the buildings in to what essentially are four boxes is the same in the Heritage and in the Hampton Ridge?

A. As they are in many projects we do.

Q. I understand that. And the six garages on the ends of the units with direct access, right? Is that right?

A. Is that right that—

Q. They both have the six garages on the ends with direct access to the units?

A. That is correct.

Q. I take it if you sat down with the Heritage and the Hampton Ridge, you could go through, find slews of differences; is that right?

A. I probably could.

Q. Would you think that they are, the one is derivative of the other to use a term?

MR. HEALY: I'll object to the form of the question.

Q. I mean did you use Heritage as your inspiration for your Hampton Ridge?

A. No.

[170] Q. Didn't at all?

A. Not inspiration.

Q. Did you use it as a basis for figuring out how to locate and plan the layout of the space?

A. No more than I've used any other projects that we have done in the past and drawn on that experience.

Q. Which gets to the next question. What is that prior twelve-unit condominium with attached garages at the ends that you've done other than Heritage? Maybe Stratford?

A. I don't recall whether the exact numbers are right, but we've done jobs for Classic Construction.

Q. I understand that. I'm asking you for twelve-unit, six garages on each end, stacked ranches, our on the first floor, you know, what is there that you've done other than Heritage?

A. I don't know that we've done another project exactly as you have indicated. We've done many twelve-unit projects.

Q. I understand that.

A. With garages.

Q. Would you agree that Heritage is that which is most closely similar to Hampton Ridge?

[171] MR. HEALY: Object to the form of the question.

Q. We can sit here, go through this whole exercise all over again comparing Heritage to Hampton Ridge, but I think we can spare the exercise. You'll agree there's a substantial similarity in the layout and footprint of the buildings; would you agree?

A. There's similarity in the concept.

Q. And in the layout of the building?

MR. HEALY: I'll object to the form of the question.

Q. We can do—you want to do this exercise?

A. No.

Q. I mean do you agree or disagree? I don't want you to agree to something you don't want to agree to. Let me ask this question by the way. How much different in building size is Hampton Ridge from the Heritage building?

A. I don't know. I've never compared them.

Q. How much different in apartment size is Heritage from Hampton Ridge?

A. Apartment size?

Q. Uh-huh, or condo unit size, call it what you wish?

A. From Heritage, you mean individual units?

[172] Q. Yes.

A. I don't know, sir. I have not compared them.

Q. Can we agree that there's substantial similarity between Hampton Ridge and Heritage as regards to the building footprint and the layout of the spaces, garage, units, stairwells?

MR. HEALY: Oobject to the form of the question, also that's calling for a legal conclusion.

MR. WASINGER: Maybe it is or maybe it isn't.

A. I don't know that the footprint is substantially similar.

Q. Why do you say that?

A. Because I don't know offhand the dimensions of each building well enough that I can tell you that's the case.

Q. All right. Let's see if we can go to something that doesn't require your architectural precision. I take it you've seen model cars and big cars?

A. Sure.

Q. Have you gone to a toy store, seen a model car and a toy car?

[173] A. Yes.

Q. Can you agree model Chevrolets can look like big Chevrolets?

A. Yes.

Q. Even though they're different sizes but they're dimensionally substantially similar?

A. Yes.

Q. You can scale it up or down a foot or up or down ten feet if you wished and have same basic structure and layout just as you can have a model car and a big car, right?

A. However, in a case of that, the aspects, the ratio of the width to the length is the same in proportion in both the big car and the short car.

Q. Exactly. My question to you is other than some perhaps scaling differences and things, is there substantial similarity between Heritage and Hampton Ridge?

MR. HEALY: I'm going to object to the form of the question.

A. Well, again, my response, sir, is that not knowing what the ratio of the length to the width is, what those proportions are, that to me would mean whether or not there's substantial similarity or not, I don't know off the cuff what those numbers are, what [174] that ratio might be.

MR. WASINGER: Thanks. I have no further questions.

(Recess).

EXAMINATION BY MR. HEALY:

Q. Counsel asked you to compare the differences between the Aberdeen plan depicted in Stapleton Exhibit 44 and the Hampton Ridge plan depicted in Exhibit 43. Was that an exhaustive list or review of those differences?

A. No, sir.

Q. Do you have Exhibit 43?

MR. WASINGER: I think we should make clear it's Stapleton 43 because Mr. Cantor didn't want to number things sequentially, we got a lot of different 40s.

Q. Now, in Exhibit, in regard to Exhibit, Stapleton Exhibit 43, the overlay for that is marked Aberdeen. Do you know which Aberdeen project is depicted in Stapleton Exhibit 43?

A. No, I do not.

Q. Do you know whether the Aberdeen plan depicted in Stapleton Exhibit 43 is the same plan as the subject matter of the copyright registration in this case?

[175] A. No, I do not.

MR. HEALY: Do we have that other Aberdeen plan that he *was* shown initially?

MR. WASINGER: That has not been marked.

MR. HEALY: Right.

MR. WASINGER: Yes. Do you want to mark it?

DEPOSITION EXHIBIT NUMBER 70 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

Q. I'd like to show you what we've marked as Attard Exhibit Number 70 and ask if this is the floor plan that counsel initially showed you that's labeled Aberdeen Village when he asked you to make a comparison between Aberdeen and Hampton Ridge?

A. I believe this was the one that I first viewed, yes.

Q. Now, if I look at the, on the, looking at the first floor plan—well, can you look and see if these are the same plans, Exhibit 70 and the Aberdeen that's attached to Exhibit—well, the Stapleton Exhibit 43? Take your time.

MR. WASINGER: It might make it easier there's a hard copy so you can do a comparison [176] more readily if you want. Exhibit 44 has the Aberdeen that I asked you to look at, so you don't have to look at the overlay. That might be the better way to do it.

A. These look to be the same.

MR. HEALY: Okay. Thanks. That's all the questions I have.

EXAMINATION BY MR. LALONE:

Q. Mr. Attard, I have a few questions for you. Have you ever been to Hampton Ridge and seen the developments?

A. I've driven by it.

Q. Would you know what the buildings look like if you were shown a picture?

A. Yes.

Q. What about Chatterton Village; have you ever been past Chatterton Village out in Canton?

A. No, I have not.

Q. Would you know what the building would look like if you were shown a picture of it?

A. I know what it would look like because we designed it, yes.

Q. What about Aberdeen village, the building that's at issue in this case. Have you ever seen Aberdeen village?

A. Where is Aberdeen Village?

[177] Q. Okay. I take it you have not seen Aberdeen Village?

A. I don't know where it's at.

Q. I'll represent to you it's on Twenty-Six Mile up in Shelby Township, okay? Are you familiar with that area at all?

A. I'm somewhat familiar, but not very familiar with that area.

Q. Have you ever been to Aberdeen Village on Twenty-Six Mile?

A. No, sir.

Q. Have you ever taken a picture of Aberdeen Village?

A. No, sir.

Q. Have you ever asked anybody to take pictures of Aberdeen Village?

A. No.

Q. Has anybody at Progressive Associates ever done a walk through or inspected Aberdeen village to your knowledge?

A. No.

Q. If I were to show you a picture of Aberdeen Village, would you be able to recognize it?

A. Probably not.

Q. Okay. To help our discussion here, I want [178] to mark—71 is going to be series of photographs of Hampton Ridge I'll represent to you because I took the picture.

DEPOSITION EXHIBIT NUMBERS 71-73 WERE MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. Let me just clarify for the record. Exhibit 71 are three pictures marked A, B, C, of the Hampton Ridge located in Howell, Michigan. These are photographs of the side elevation, front elevation and a perspective view of the Hampton Ridge that I personally took. Exhibit 72 are three photographs again marked Exhibits A, B, C, three separate pages, page one identified as A is an end view of the chatterton Village located in Canton, Michigan. B is a side view. And C is a perspective view of the Chatterton village.

Then I'd like to identify as Exhibit 73 four separate photographs of Aberdeen Village located in Shelby Township, Michigan. Again, we have end view, elevational side view, and a perspective view. You're referring to these on

here. By the way, Exhibit 73 is the Aberdeen Village. Have you ever seen anything that looks like that before? Have you ever actually been to Aberdeen Village, seen [179] that picture before?

A. I have not been to Aberdeen Village nor have I seen this picture before.

Q. Did you ever photocopy the Knollwood or Aberdeen Village plans?

A. No. No, sir.

Q. Did you ever instruct anybody at Progressive Associates to do that?

A. No.

Q. Did you or anybody at Progressive Associates ever trace the Knollwood or the Aberdeen Village plans?

A. No, sir.

Q. Do you know who Michael P. Horowitz is?

A. Yes, sir.

Q. Are you aware he is a co-defendant in this case?

A. I am, sir.

Q. Was Michael Horowitz involved in any way whatsoever with the design of the Hampton Ridge project?

A. Not to my knowledge.

Q. Or the Chatterton?

A. I've never had a meeting with Michael Horowitz regarding either project.

[180] Q. Did you ever talk to Mr. Horowitz about the Hampton or the Chatterton project?

A. No, sir.

Q. As I understand it, your contacts were with Mr. Cantor, Mr. Friedman; is that right?

A. That's correct.

Q. To your knowledge, did Mr. Horowitz ever copy the Knollwood or the Aberdeen plans?

A. To my knowledge, no.

Q. Did Mr. Horowitz provide you with a copy of the Knollwood plans or the Aberdeen plans?

A. No, sir.

Q. Or any brochures regarding those?

A. No, sir.

Q. Did Mr. Horowitz ever tell you to copy the Knollwood or the Aberdeen plans or anything from plaintiffs Chirco or Moceri?

A. No, sir.

Q. Did Mr. Horowitz ever tell you knock off the Aberdeen Village plan or the Knollwood plan?

A. No, sir.

Q. Did he tell you knock off anything by any of the plaintiffs in this case?

A. No, sir.

Q. Did Mr. Horowitz ever tell you to go [181] inspect the Knollwood or the Aberdeen Village or any other project by plaintiffs Moceri and Chirco?

A. No, sir.

Q. Did Mr. Horowitz ever tell you to go and photograph the Knollwood or the Aberdeen Village or any other project by Moceri or Chirco?

A. No.

Q. Did Mr. Horowitz ever direct you to go to the city and obtain copies of the Knollwood plans?

A. No, sir.

Q. Or go to the city, obtain copies of the Aberdeen village plans?

A. No.

Q. In fact, did you ever do that?

A. No.

Q. Did anybody at Progressive Associates ever go to the city, obtain any Knollwood or Aberdeen Village plans to your knowledge?

A. No.

Q. To your knowledge, did Mr. Horowitz ever take a copy of the Knollwood or Aberdeen plans and cut off Mr.

Mayotte's name or seal, replace it with Progressive Associates' name or seal?

A. To my knowledge, no.

Q. Did you ever do that?

[182] A. No.

Q. Did anybody at Progressive Associates ever do that?

A. Not to my knowledge.

Q. Did Mr. Tosch, Daniel Tosch, the owner of Progressive Associates, ever take a copy of the Knollwood or Aberdeen Village plans and cut off Mr. Mayotte's name or seal and replace it with Progressive Associates' name and seal?

A. Not to my knowledge.

Q. Has anybody that you know of ever cut off Mr. Mayotte's name and seal period?

A. Not to my knowledge.

Q. I have similar questions for the remaining defendants, I'm lumping them together. I think it would make it easier to go through. I asked you specific questions regarding Mr. Horowitz. There are other defendants in case, for example, Hampton Ridge, L.L.C. do you know who they are?

A. No.

Q. Do you know who Selective-Delaware, L.L.C. is?

A. Who, what entity, what persons are that entity?

Q. Well, are you familiar an entity called [183] Selective-Delaware, L.L.C.?

A. No, sir.

Q. Are you familiar with an entity called Centex Homes Realty, Inc.?

A. Yes.

Q. How do you know Centex Homes Realty, Inc.?

A. Through our dealings with the Selective people.

Q. I'm going to ask you a series of questions, I'm going to lump them together. Has Hampton Ridge, L.L.C., Selective-Delaware, L.L.C., or Centex Homes Realty, Inc.,

ever copied the Knollwood plans or the Aberdeen plans to your knowledge?

A. Not to my knowledge.

Q. Did any of those three entities ever ask you or Progressive Associates to copy the Knollwood or Aberdeen plans?

A. No, sir.

Q. Did Hampton Ridge, Selective-Delaware or Centex Home Realty ever provide you with a copy of the Knollwood or Aberdeen plans?

A. No.

Q. Or brochures?

A. No.

Q. Did Hampton Ridge, Selective-Delaware or [184] Centex Home Realty ever tell you to copy the Knollwood or the Aberdeen plan or anything from plaintiffs Chirco or Moceri?

A. No.

Q. Did Hampton Ridge, Selective-Delaware or centex Homes Realty ever tell you to knock off the Aberdeen Village or the Knollwood plans?

A. No.

Q. Or anything else from plaintiffs Moceri or Chirco?

A. No.

Q. Did Hampton Ridge, Selective-Delaware or Centex Homes Realty ever tell you to go and inspect the Knollwood or the Aberdeen Village or any other project by Moceri or Chirco?

A. No, sir.

Q. Did Hampton Ridge, Selective-Delaware or Centex Homes Realty ever tell you to go and photograph the Knollwood or the Aberdeen Village or any other project by Moceri or Chirco?

A. No.

Q. Did Hampton Ridge, Selective-Delaware or Centex Home Realty ever instruct you or Progressive to go to the city

and obtain copies of the Knollwood or Aberdeen village plans?

[185] A. No.

Q. Did Hampton Ridge, Selective-Delaware or Centex Homes Realty ever instruct you or Progressive Associates to take a copy of the Knollwood or Aberdeen plans, cut off Mayotte's name or seal, and replace it with Progressive Associates' name and seal?

A. No, sir.

Q. Did you or Progressive ever reproduce or distribute copies of the Aberdeen village or Knollwood plans?

A. No, sir. Not to my knowledge.

Q. Did you or Progressive Associates ever make any derivative works of the Aberdeen village or Knollwood plans?

A. Any what, sir?

Q. Derivative works?

A. No, sir.

Q. Do you know what derivative works means?

A. Yes.

Q. Did defendants Hampton Ridge, L.L.C., Selective-Delaware, L.L.C., Centex Homes Realty or Michael P. Horowitz ever instruct you or anyone at Progressive Associates to reproduce, distribute or make derivative works of either the Aberdeen village or the Knollwood plans?

[186] A. No, sir.

Q. I understand from your earlier testimony that you never met with Mr. Horowitz in connection with the Hampton or the Chatterton project; is that correct?

A. That is correct.

Q. So I take it Mr. Horowitz never gave you or Hampton any drawings or sketches concerning Hampton or Chatterton; is that right?

A. That is correct.

Q. Did Mr. Horowitz ever provide you or anyone at Progressive Associates with any feedback regarding any signs concerning Hampton or Chatterton?

A. Mr. Horowitz?

Q. Correct.

A. No, sir.

Q. Did Mr. Horowitz ever provide you or anyone at Progressive Associates with any creative input in to the design process for making the Hampton Ridge or the Chatterton plans?

A. No, sir.

(An off the record discussion was held.)

Q. Mr. Attard, did Michael Horowitz draw any of the lines that appear on Progressive Associates' [187] Hampton Ridge blueprints?

A. Not to my knowledge.

Q. Did he draw any lines that appear on the Chatterton blueprints?

A. Not to my knowledge.

Q. Who did?

A. Employees of Progressive Associates.

Q. Including you?

A. To a certain extent, yes.

Q. Can you tell me briefly the process you went about to actually drawing the Hampton Ridge plans?

A. The process?

Q. The process of drawing?

A. Are you inquiring about once the design is set, what we then drew?

Q. Well, let's start with the actual construction drawings themselves which I think they're laying over here on the floor. I mean we can show them to you if you like. What actual process did you go through? Did you get a blank piece of paper, put it on the board, did you do it on the paper? What

process did you go through to draw the Hampton Ridge plans?

A. Those plans are drawn electronically on a [188] computer. So we would give the conceptual documents to a drafts person, might be marked up by me as to how we're going to draw this now on a construction drawing basis, and somebody starts and draws it.

Q. How long did that design process take? Would you say the—I should say the drawing process?

A. The drawing of the construction drawings?

Q. Correct.

A. Four to six weeks.

Q. There were other individuals involved in the drawing process besides you; is that correct?

A. Yes.

Q. Did you oversee those individuals that were drawing?

A. Yes.

Q. Were you in charge of this project?

A. Yes.

Q. Are you considered the chief architect of the Hampton Ridge project?

A. Yes.

Q. Likewise for the Chatterton project, are you considered the chief architect on that project?

A. Yes.

Q. So people were working for you reporting to you in connection with the Hampton Ridge and the [189] Chatterton project; is that correct?

A. That is correct.

Q. So anything the individuals would have been doing, they would have been reporting back to you; is that right?

A. Yes.

Q. You would have been watching what they were doing I suspect; is that correct?

A. Yes.

Q. At any time during the design process for either the Hampton or the Chatterton, did you ever see any copies of any Aberdeen Village or Knollwood plans with any of your employees?

A. No, sir.

Q. Have you ever seen an Aberdeen Village or Knollwood plan anywhere at Progressive Associates?

A. No, sir.

Q. In the building anywhere?

A. Not to my recollection.

Q. It was not in front of any designer when the Hampton Ridge or the Chatterton projects were being drawn; is that correct?

A. That is correct.

Q. Can you explain what exactly the Hampton Ridge is based on? I think we talked earlier about [190] some design criteria by Mr. Friedman and a Bogaert design. In your words, can you tell us what the design for the Hampton Ridge is based on?

A. It's based on the program as presented by the client to us with regards to number of units, et cetera.

Q. That program is identified as Exhibit 69; is that correct?

A. Yeah, this was the original program I believe presented by Mr. Friedman.

Q. Okay. Anything else that the Hampton Ridge was based on?

A. Well, the field for the elevation based on Mr. Bogaerts' sketch regarding the style, conceptual style of the architecture.

Q. Is that reflected in Tosch Exhibit 3?

A. Yes.

Q. Anything else that the Hampton Ridge was based on?

A. Our experiences as architects through the years and, as i said, the requirements of the client.

Q. Okay. There were a series of drawings that Mr. Tosch testified to yesterday, I'm not sure if you're aware of, that they were marked as exhibits. I'd like to show those to you right now if I could. [191] Tosch Exhibits 50 through 55 were marked yesterday. What is Exhibit 50? We're referring to Tosch Exhibit 50?

A. Yes. This is a set of plans for what's termed a quadraminium which is a four-unit building with garages on the end with a carriage unit above the garage, of the garages.

Q. What's the date of this design, the quadraminium?

A. The job number implies the date in our office, that would be 1971.

Q. So the quadraminium was done in 1971?

A. Yes, sir.

MR. WASINGER: That's why it has that date on there. Let me ask a question. How long are we going to be at this? If we're going to ask the same question twice, et cetera, I'm leaving. It's after 5:00, we'll come back at a later time. If we're going to get done in some reasonable approximate time, but I'm not staying very much longer. You're entitled to ask him questions as long as you want. I'm not staying much longer. If you're going to be a few minutes, otherwise I'm leaving now. I'm just not going to stay a lot longer. Business hours are 5:00.

MR. LALONE: I just started.

[192] MR. WASINGER: I understand.

MR. LALONE: We'll finish today.

MR. WASINGER: We're not going to finish today.

MR. LALONE: We should be done by six.

MR. WASINGER: I'm not going to stay until six. The deposition is going to be terminated, we're not going to have a deposition.

MR. LALONE: I'm not terminating the deposition. This witness is here to take testimony. He will stay until we're finished. You're free to leave.

MR. WASINGER: This is not your witness. I have been courteous to you. We're not going to stay. If you want to stay under these circumstances where I have other commitments, you can make that decision. Then cooperation ends entirely. It is not fair whether the witness wants to stay or not to extend a deposition substantially beyond five. We can come back whenever you choose to come back.

MR. HEALY: We're not going to continue without you.

MR. WASINGER: How much longer are you going to be? I have questions that I'm going to ask after you're done. If you're going to be until [193] six, we aren't going to be done.

MR. LALONE: It won't be 6:00.

MR. WASINGER: How long will you be?

MR. LALONE: 15 minutes.

Q. Exhibit 50 refers to your 1971, I see Exhibits A, B, I see reference numerals A, B, C, D on the garages. What does that reflect?

A. Those reflect the unit types A, B, C and D of the dwelling unit designations.

Q. Okay. How long has Progressive Associates been utilizing the designation A, B, C, D on garages?

A. With respect to the dwelling units, as long as I've been employed there.

Q. Is that a common practice amongst architects to identify the garage units as A, B, C, D?

A. It's a common practice in our office.

Q. There's been some allegations that possibly that's been copied by the defendants in this case because the plaintiffs utilize exhibit or letters A, B, and C on their garages. Have you heard that allegation?

MR. WASINGER: That's not an allegation.

A. I have not.

Q. Did you or Progressive Associates copy the [194] letters A, B, C off the Knollwood plans or Aberdeen plans?

A. No, sir.

Q. We were talking about the different things that you or Progressive relied upon in creating the Hampton, you talked about Mr. Friedman's list and Mr. Bogaerts' elevation, Exhibit 3. Do any of these drawings here in front of you, Exhibit 50 through 55, do they reflect anything that Progressive would have relied upon in coming up with the Hampton design?

A. As I said previously, we drew from our past experiences. To my understanding, Dan Tosch was involved in the original creation of this and we talked.

MR. WASINGER: This is the quadraminium?

THE WITNESS: Yes, this is the quadraminium. And so all the past experiences that we have we draw upon to come up with a new project for a client.

Q. I'm just going to refer you to something here in Exhibit 50 if I may. I'm referring you also to Exhibit 71 which is the first sheet A, the Hampton Ridge, and what does that depict?

A. The garage and of one of the buildings.

[195] Q. Which building?

A. I don't know which building it appears to be.

Q. Is it a Hampton Ridge building?

A. Oh, yes.

Q. And describe for me on the second floor what's sticking out over on the right-hand side of this view?

A. That would be the deck.

Q. What does that deck stick off of or what does it extend from?

A. The building wall.

Q. Is that off of the kitchen or the dining room? Do you know offhand?

A. I don't know offhand but I can look.

Q. We don't have the Hampton Ridge plans in here.

A. That's off the living room. I was thinking we were talking about this plan. That is off the living room.

Q. I refer your attention to sheet three of Exhibit 50. Do you see the left side elevation of your Progressive Associates' quadraminium? Do you see that?

A. Yes, sir.

[196] Q. What is sticking off on the right-hand side of your building?

A. A deck.

Q. Does that deck look similar to the deck sticking off of the Hampton Ridge design?

A. Yes.

Q. So at least as of 1971, Progressive Associates was sticking a deck off the right-hand side of the second floor; is that correct?

A. We were sticking decks off the sides of buildings, yes.

Q. Okay. I'd like to refer you to the photographs in front of you, but also to Page 11, Paragraph 45-B of Dominic Moceri, Junior's February 26, 2002 Affidavit. I'll read to you Paragraph B says "The Hampton Ridge elevation, Exhibit I, is virtually identical to Aberdeen village, Exhibit C, is not similar to the Knollwood elevation, Exhibit B." So have for you elevations of the Hampton Ridge. All right. And I'll refer to Exhibit B here in the book. I'm showing you now a picture of Exhibit 71, Photograph B, the elevational view of the Hampton Ridge. Do you see that?

A. Yes, sir.

Q. I've turned to actually Tab D of the [197] Knollwood. Do you see this here?

A. Yes.

Q. Do you agree with Mr. Moceri that the Hampton Ridge elevation is not similar to the Knollwood elevation?

A. Yes.

Q. Moving on to Paragraph C, Mr. Moceri says "Comparing a photograph of a Hampton Ridge building, Exhibit J, to a photograph of the Aberdeen Village"—strike that. Paragraph C says "Comparing a photograph of the Hampton Ridge building, Exhibit J, to a photograph of the Aberdeen building, Exhibit E, again demonstrates that Hampton village is a clear copy of Aberdeen but not of Knollwood, Exhibit D." Do you see that?

A. I see it.

Q. All right. Do you agree with Mr. Moceri that the Hampton Ridge building is not a copy of the Knollwood building?

A. Yes, I do agree.

Q. Have you had a chance to read the deposition transcripts in this case, sir?

A. Some of them, not all.

Q. Have you had a chance to read Dominic Moceri's March 21, 2002 transcript?

[198] A. No, sir.

Q. Refresh, not refresh your recollection but I'll show it to you okay. Question by Mr. Cantor. "Well, i guess I should get to the point. Do you agree that the Hampton Ridge started with the elevation, the Hampton Ridge design is not similar to Knollwood? Answer: It is not similar to Knollwood. The look and feel is completely different." The question I have for you is the Hampton Ridge not similar to Knollwood?

A. Is the Hampton Ridge not similar to Knollwood? Yes.

Q. Okay. Is the look and feel between the Knollwood and the Hampton Ridge completely different?

A. Yes.

Q. So you agree with Mr. Moceri's statement?

A. I do.

Q. I also refer you to Page 168 of Mr. Moceri, Junior's March 21, 2002 testimony where he says "Question: Are you stating there unequivocally that by looking at a photo of the

building itself, that Hampton Ridge is not a copy of the Knollwood building which is what seems to be implied here?

Answer.: Hampton is not a copy of Knollwood building, correct. Hampton is not a copy of the Knollwood works and building." Do you see that?

[199] A. I do see that.

Q. Do you agree with Mr. Moceri's testimony?

A. I do agree.

Q. I'm going to show to you Paragraph 10, Page 3 of Charles Mertz's March 29, 2002 Affidavit that has been signed in this case. Paragraph 10, he identifies the Aberdeen plans and specifications, describes a unique twelve-unit residential building. There are four units on the first floor as well as two rows of six single car garages on the first floor, one on each end of the building. There are eight units on the second floor of which four are over the garages. Each of the four second floor units which are constructed over a garage are placed on three garages which allows the building to be built as four distinct quadrant angles with fire rated walls separated each quadrant angle. Pursuant to the unique plan, each of the twelve garages has direct access to its assigned residential unit without requiring the occupants to go outside or use a common hallway to access their units. All right.

He goes on in Paragraph 11 to state one of the unique aspects of that Aberdeen condominium is the way that it can occupy a site, he goes on. Do you see that?

[200] A. Yes.

Q. A couple questions for you. Did you copy the twelve-unit residential building feature from Aberdeen or Knollwood?

A. No, sir.

Q. Did you copy the four units on a floor feature from Aberdeen or Knollwood?

A. No, sir.

Q. Did you copy the two rows of six single-car garages on the first floor from Aberdeen and Knollwood?

A. No, sir.

Q. Did you copy the eight units on the second floor from Aberdeen or Knollwood?

A. No, sir.

Q. Did you copy four units over the garages from Aberdeen or Knollwood?

A. No, sir.

Q. Did you copy the feature of each of the four second floor units being constructed with a garage from Aberdeen or Knollwood?

A. No, sir.

Q. Did you copy the feature of each of the twelve garages having direct access to its assigned residential unit from either Aberdeen or Knollwood?

[201] A. No, sir.

Q. Did you copy the way the condominiums can occupy the site from either Aberdeen or Knollwood?

A. No, sir.

Q. Did anybody at Progressive, would your answer be the same if I were asking this for anybody at Progressive?

A. Yes, sir.

Q. There's additional Item Number 9 here that Mr. Mertz identifies as being a unique aspect of the Aberdeen condominiums. He says another unique aspect of the Aberdeen condo is their architectural features including the way that both the front and backs are architecturally identical. Do you see that?

A. I do see it.

Q. Did you or anyone at Progressive Associates copy that feature from Aberdeen or Knollwood?

A. No, sir.

Q. Were you aware that Aberdeen or Knollwood contained any of these features that were purportedly unique?

A. No, sir.

Q. Was the idea of having a twelve-unit building known to you prior to 1986?

A. Yes, sir.

[202] Q. How is that?

A. We had done twelve-unit buildings for various clients.

Q. I'm going to show you 74.

DEPOSITION EXHIBIT NUMBER 74 WAS MARKED BY THE REPORTER FOR IDENTIFICATION?

Q. Exhibit 74 is a, identified for the record as three sheets of photographs of Glens of Bloomfield at 7359 Deep Run Road, Bloomfield Township, Michigan, by Robinson Brothers built in 1996. Do you see where it says on the bottom right-hand corner?

A. Yes.

Q. Please take a look at that, tell me if you can identify those buildings.

A. Identify their location?

Q. Have you ever seen those before?

A. Yes, I have.

Q. Why is that?

A. Because I drive by Telegraph and Fourteen Mile almost daily going to work.

Q. How many years have you been driving past The Glens on your way to work?

A. As long as we've been at our present location which I'm going to guess is ten years, twelve [203] years.

Q. Okay. What type of building is reflected in Exhibit 74?

A. It's a residential building with garages below, two stories of dwellings which are directly above it.

Q. How many garages are on each end of the building?

A. Four two-car garages.

Q. Is there direct access from the garage to the inside of the building?

A. I don't know.

Q. How else would somebody get inside the dwelling if they didn't go through the garage?

A. Well, they'd have to come out the garage door and walk around to a door at the front or at the back.

Q. Please look at Drawings B and C attached to Exhibit 74. Have you also seen those buildings located in The Glens of Bloomfield?

A. I can't recall. I've never driven through The Glens of Bloomfield.

Q. Look at Exhibit C.

A. I don't recall this one either.

Q. Do all three of these photographs depict [204] buildings having a multiplex with garages tucked in under the end?

A. Yes, sir.

Q. With carriage units over the top of the garage?

A. It appears so.

MR. WASINGER: Carriage unit?

MR. LALONE: A carriage unit. Did I, misspeak?

MR. WASINGER: I was curious if you said the word carriage unit.

DEPOSITION EXHIBIT NUMBER 75 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

Q. When was the Hampton Ridge set of drawings completed?

A. I don't recall the exact date or the approximate date.

Q. Would it appear on the face of the drawings?

A. Yes.

MR. LALONE: Can I borrow that set of construction drawings you have there?

MR. WASINGER: Which one?

MR. LALONE: For Hampton Ridge.

[205] Q. Do you recognize this stack of drawings I just laid before you?

A. Yes.

Q. What are they?

A. Various drawings prepared by Progressive Associates for the Fox Run which became Hampton Ridge project.

Q. Is this a current working set of construction drawings for the Hampton Ridge?

A. No, sir.

MR. LALONE: Do you have a set of those here.

MR. WASINGER: No.

Q. Okay. I'm looking at Progressive Bates number PR0217, first floor plan of Fox Run. It has a date on it of June 23, 2000. Do you see that?

A. Yes, sir.

Q. What does that date reflect?

A. That reflects the date that this drawing was put together.

Q. Would the Hampton Ridge plans have been finished before or after June 23, 2000?

A. After.

Q. What's this right here?

A. That's—

[206] Q. I'm showing you a document marked Bates number PR0220. Do you see that?

A. Yes.

Q. What is this?

A. This is a set of construction drawings for the Hampton Ridge project.

Q. Is this a complete set?

A. Without looking through every sheet, I wouldn't know.

Q. Take a quick look.

DEPOSITION EXHIBIT NUMBER 76 WAS MARKED BY THE REPORTER FOR IDENTIFICATION.

A. This appears to be a complete set.

Q. Okay. Let's identify, I'm going to mark as Exhibit 76—

MR. WASINGER: You're doing this why, just so you can establish a date that we can, that we're going to have to copy seventeen pages of documents?

MR. LALONE: We need a set for the record.

Q. Exhibit 76 is a set of the Hampton Ridge construction documents starting with PRO220 through and including—

[207] MR. HEALY: Is this part of it.

A. The construction drawings stop at E-4. This is part—

Q. This is an electrical?

A. No, this is.

Q. Fox Run?

A. Earlier.

Q. Thank you. You're right. we don't want the Fox Run.

MS. GREENBERG: Can you give us the Bates numbers?

Q. We'll start the Bates numbers all over. PRO220 through and including PRO253. okay. Would you please just identify for the record what Exhibit 76 is?

A. It's a set of Hampton Ridge construction drawings, phase one.

Q. When were these drawings completed?

A. Well, they were issued for permit March 16, 2001. That's when I would say they were substantially complete.

Q. March 16, 2001 is when the Exhibit 76 set of Hampton Ridge documents were essentially completed, correct?

A. Yes.

[208] Q. They were revised again on June 25, 2001; is that correct?

A. That's when it says, yes.

Q. Is this the current set of working drawings that's being used?

A. I don't believe so.

Q. Is there a later version or revision should say?

A. Yes.

Q. Did Mr. Horowitz have anything to do with drawing anything that's illustrated in Exhibit 76?

A. No.

Q. Did Selective-Delaware, L.L.C. or Hampton Ridge, L.L.C. or Centex Homes Realty have anything to do with the design or designs that are depicted in Exhibit 76, the Hampton Ridge plans?

A. Yes.

Q. Was that to the extent of the input that was illustrated by Mr. Friedman in his Exhibit 69?

A. And his review of the drawings as we progressed and their input.

Q. Did anybody at Centex Homes Realty ever give you any input to the design or creation of anything illustrated on the Hampton Ridge plans shown in Exhibit 76?

[209] A. Repeat the question.

(said question was read back.)

A. I don't believe so.

Q. I'm going to hand to you what's been previously marked as Exhibit 46. Have you ever seen this building before?

A. Yes.

Q. What is it?

A. This is a picture of Maple Place condominiums in West Bloomfield.

Q. Were you involved with that project?

A. Yes, I was.

Q. What was your involvement?

A. I was, worked on the drawings.

Q. Does that have four connected garages?

A. It has garages on the ends, yes.

Q. Had you or Progressive ever done a project prior to Maple Place that had garages tucked in on the ends?

A. Yes.

Q. Which ones?

A. Plum Brook I believe is the name of a particular project I recall.

Q. Is there a picture of that here?

A. I don't believe there's a picture of Plum [210] Brook.

Q. Anything—

A. There's plans.

Q. Are the plans here?

A. Yes.

Q. Which plan number is it? Exhibit 52 is Plum Brook; is that right?

A. That's correct.

Q. This has the four garages tucked in on the ends?

A. One, two, three, four, five, six.

Q. Did these garages, are they attached to the dwelling structure?

A. Yes.

Q. Is there any entrance from the dwelling structure to the garage?

A. I believe not.

Q. Do you have Exhibit 58, I'm sorry, 48 in front of you and 49?

A. Are they plans or are they pictures? Here's 48.

Q. Are you familiar with a development called Huntington Park?

A. Somewhat.

Q. I'm showing you pictures or exhibits that [211] have been identified as pictures, Exhibit Numbers 48 an 49. Do you see that?

A. Yes, I do.

Q. Are those five car garages tucked in on the ends of the building units?

A. Yes, it is.

Q. And are the carriage units on the top of the five car garage units?

A. It appears there's a dwelling unit above the garages.

Q. This goes back to 1986, best of your a knowledge?

A. That's what it says, yes.

Q. As of 1986, tucking five cars underneath the ends of a carriage unit was well-known; is that correct?

A. Yes.

Q. It was an old idea?

A. It's an idea that's been used.

Q. What functions do the garages attached to the underneath of a carriage unit provide?

A. What functions?

Q. Right.

A. Well, it allows you the function of being able to connect the dwellings to the garages if you so [212] chose, allows you to make the footprint of the building smaller as opposed to building the garages exterior to the building.

Q. Does that feature allow you to have any other, does it serve any other function, put it that way?

A. It puts the garages and the parking space in close proximity to the dwellings, provides for covered parking.

Q. Does it serve any other function?

A. Offhand I can't think of any, though I'm sure there are.

Q. Prior to 1986, had you ever seen a back to back stacked design for a multi-family dwelling?

A. Yes.

Q. Is there a picture or is it depicted anywhere in the drawings in front of you?

A. I believe there's Oakwood Villas.

Q. Referring to Exhibit 51?

A. Back to back, side to side, and stacked.

Q. That's dated October 16, '72?

A. Yes, sir.

Q. So as of october 1972, Progressive had a design of back to back and stacked multi-dwelling units; is that correct?

[213] A. That is correct.

Q. Is there a separate entry way for each unit with this Oakwood villas design?

A. Yes, sir.

Q. To the exterior?

A. Yes.

Q. It does not utilize a common hallway, does it?

A. That is correct.

Q. So the idea of a back to back, stacked, multi-dwelling unit is old, at least as of 1972; is that right?

A. I would agree.

Q. That feature is an old idea?

A. I would agree.

Q. Can I refer your attention to Exhibit 52?

MR. WASINGER: We're already a half hour over fifteen minutes.

MR. LALONE: Just about finished.

A. 52 perhaps a picture?

Q. It should be a drawing.

A. I don't see a 52.

Q. We'll do it without the drawing. Prior to 1986, was the idea of a back to back, multi-unit an old idea?

[214] A. An old idea?

Q. An old idea?

A. Prior to—

Q. 1986?

A. Yes.

Q. Prior to 1986, was the idea of a stacked condo design, was that an old idea?

A. Stacked what design?

Q. A stacked condo or apartment design, was that an old idea?

A. Yes, it was an old idea.

Q. Prior to 1986, was a multi-family unit an old idea?

A. Multi-family units, yes.

Q. Prior to 1986, was the idea of garages tucked in on the ends of building, was that an old idea?

A. Yes.

Q. Prior to 1986, was it an old idea to have garages being covered by carriage apartments or condos?

A. Yes.

Q. Prior to 1986, was it an old idea to have garages with entries in to the living area?

A. Yes.

[215] Q. Prior to 1986, was it an old idea to have separate entries for each unit?

A. Yes.

Q. Prior to 1986, was it an old idea to have front and back elevations the same?

A. Yes.

Q. Or identical?

A. Yes.

MR. LALONE: No further questions. Thank you.

EXAMINATION BY MR. WASINGER:

Q. I just wanted to ask you a couple questions out of curiosity more than anything else. Where is the pictures of the Chatterton here? What's going on in the first page of 72? There are those garage doors as you understand it.

A. No.

Q. What do you think those are? Have you been involved in some design change to change garages or something else to something else?

A. No, sir.

Q. What do those look like to you as an architect?

A. I suspect this is going to be their sales area and they're converting it as a temporary sales [216] space.

Q. Is it your view that there are no similarities, he went through that list of the, of Mr. Mertz. Do you know Charles Mertz by any chance?

A. No, I do not, sir.

Q. All right. He went through a list of similarities or a list of features in the Aberdeen that he considered to be unique. would you agree that those features are also found in the Chatterton and Hampton Ridge plans?

A. Yes.

MR. HEALY: Do you remember the features?

THE WITNESS: Yes, I think I do remember them.

Q. You agree that's just a coincidence that's a similarity between the Hampton Ridge and Aberdeen?

MR. HEALY: Object to the form of the question.

Q. Do you believe that the similarities between Aberdeen and Hampton Ridge building are just a coincidence?

MR. HEALY: I have the same objection.

A. Yes.

[217] MR. WASINGER: Thank you. I have no further questions.

(Deposition concluded at 5:30 P.M.)

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SUPREME COURT, U.S.

In the Supreme Court of the United States

CROSSWINDS COMMUNITIES, INC.,
and BERNARD GLIEBERMAN,
Petitioners,

v.

MICHAEL A. CHIRCO and DOMINIC MOCERI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

Stephen Wasinger
Counsel of Record
STEPHEN F. WASINGER PLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, MI 48073
(248) 554-6306
sfw@sfwlaw.com

Counsel for Respondents
Michael A. Chirco and Dominic Moceri

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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SUMMARY OF THE ARGUMENT

Petitioner misstates the proceedings below. The District Court did not enter a final judgment, pursuant to Rule 52, F.R.Civ.P. It granted summary judgment pursuant to Rule 56, F.R.Civ.P.

The District Court's grant of summary judgment was clearly erroneous because (1) the District Court resolved factual issues against respondents, the non-moving parties, and (2) the District Court used the wrong legal standard.

The Sixth Circuit's decision is confusing and without clear direction because, on the one hand, the Sixth Circuit correctly recognized that laches will not generally apply to statutory claims which are brought within the statutory limitations period. In doing so, it followed this Court's guidance in *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). *See also United States v. Mack*, 295 U.S. 480, 489 (1934); *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 244-245 n. 16 (1985).

However, the Sixth Circuit also concluded that an exception should apply if "the relief sought will work an *unjust* hardship upon the defendants or upon innocent third parties. . . ." App. at 36a.

The Sixth Circuit reached this hybrid result based on its views that:

> . . . the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand.

This conclusion, in the proper circumstances, would merit review by this Court. However, in this case, the Sixth Circuit's decision lacks both clarity and finality. The Sixth Circuit reversed for further proceedings to determine whether Respondents claimed relief which was not barred by laches.

Respondents clearly sought a variety of relief, including statutory damages and injunctive relief which would not be foreclosed under the Sixth Circuit's rule. Therefore, review by this Court is premature.

However, if this Court decides to review the Sixth Circuit's decision, then it should reject the Sixth Circuit's hybrid approach and adopt a bright line rule that their claims brought within the three year limitations period in Section 507(b) of the Copyright Act, 17 U.S.C. § 507(b), cannot be barred by laches.

COUNTER-STATEMENT OF PROCEEDINGS

Plaintiffs-Appellants Michael A. Chirco and Dominic Moceri are in the business of developing real estate, including condominiums and single family homes in the metropolitan Detroit area. App. at 137a.

Plaintiffs are exclusive licensees of copyrights for architectural plans and architectural works for condominiums commonly known as the Aberdeen condominiums (the "Aberdeen copyrights"). App. at 2a.

Plaintiffs commenced an action in the United States District Court for the Eastern District of Michigan on April 10, 2001, claiming that certain Defendants — including Bernard Glieberman — had infringed the Aberdeen copyrights by developing a condominium project in Waterford, Michigan

(the "Waterford Condominiums"). App. at 1a-2a. The complaint in the First Lawsuit asked the court to grant relief expressly authorized by the Copyright Act, including an injunction against future infringement, including the building or selling of condominiums based on the copyrighted architectural plans; impoundment and destruction of infringing copies; and a money judgment in accordance with 17 U.S.C. § 1117. *See, e.g.*, App. at 130a, 141a .

Thus, the complaint in the First Lawsuit sought relief which gave express notice that Plaintiffs would proceed against the Defendants not only for the original Waterford Condominiums but for any additional development which infringed Plaintiffs' copyrights.

On January 21, 2003, Defendants in the First Lawsuit filed various motions for summary judgment seeking to dismiss all or part of the complaint in the First Lawsuit. Mr. Glieberman individually moved for summary judgment claiming that he could not be liable for the actions of the defendant corporate entities.

The District Court heard these motions on March 12, 2003.

On October 10, 2003, the District Court issued its Order and Opinion in the First Lawsuit which denied Defendants' motions for summary judgment. The District Court specifically found that Mr. Glieberman controlled and dominated the corporate entities and could be jointly and severally liable for their infringement. App. at 3a.

Plaintiffs could have pursued the Jonathan's Landing claims by moving to amend the Charter Oak complaint. Pursuant to Rule 15(c), F.R.Civ.P., the Jonathan's Landing

claims would relate back to the date the original complaint was filed. Plaintiffs concluded, however, that moving to amend would likely further delay proceedings and involve additional briefing which would burden the court. Plaintiffs were cognizant of the fact that the District Court had taken months to decide prior motions. App. at 129a-130a.

To avoid the delays and burdens of additional motions, on November 14, 2003, Plaintiffs filed a separate complaint challenging the Howell Condominiums. Plaintiffs knew that, under the Local Rules for the Eastern District of Michigan, the Second Lawsuit would be assigned to Judge Hood as a related case. *See* E.D.Mich. L.R. 83.11(b)(7) (addressing "companion cases"). App. at 2a, 136a.

The Second Lawsuit claimed that Mr. Glieberman and his alter ego, Crosswinds Communities, had infringed the Aberdeen copyrights by developing a condominium project in Howell, Michigan (the "Howell Condominiums"). App. at 136a. The complaint in the Second Lawsuit recognized, and relied on, the fact the First Summary Judgment motion had found Mr. Glieberman could be held jointly and severally liable for the actions of the entities which he controlled and dominated. App. at 129a-130a.

Defendants refiled summary judgment motions in the First Lawsuit on April 1, 2004. App. at 16a. They also filed a motion for summary judgment, pursuant to Rule 56(c), to dismiss the Second Lawsuit on grounds of laches. Defendants argued that Plaintiffs had waited 18 months after they knew of the Howell Condominiums before starting the Second Lawsuit and Defendants were prejudiced by the delay.

The Court heard arguments on these motions on July 21, 2004. App. at 122a.

On March 31, 2005, the District Court issued an Opinion and Order in both Lawsuits, which again denied the motions for summary judgment in the First Lawsuit but granted summary judgment dismissing the Second Lawsuit on grounds of laches. In deciding that Plaintiffs were guilty of laches, the District Court referenced the fact that Crosswinds Communities had not been a defendant in the First Lawsuit, but it ignored the fact that Bernard Glieberman was a defendant in the First Lawsuit and the Second Lawsuit and that, in the First Lawsuit, the District Court had found that Mr. Glieberman could be jointly and severally liable for the infringing actions of the corporate entities, including Crosswinds, which he controlled and dominated. App. at 17a-19a.

The District Court also found that "Defendants had no notice that Plaintiffs were going to sue them regarding this project." App. at 19a. In doing so, the District Court exceeded its powers in deciding a Rule 56 motion, and it ignored the prayer for relief in the original complaint which sought an injunction any future infringements based on the Aberdeen Plans.

The District Court entered a judgment dismissing the Second Lawsuit on March 31, 2005. App. at 21a.

Pursuant to 28 U.S.C. § 1292(a), Plaintiffs filed an appeal as a matter of right from the district court's summary judgment dismissing Plaintiffs' Complaint. The appeal was docketed as appeal number 05-1715. On January 10, 2007, the Sixth Circuit issued its opinion in this matter. App. at 23a.

The Sixth Circuit applied a de novo standard of review because it was "presented with a threshold question of law as

to whether the laches doctrine is even applicable in a particular situation. . . ." App. at 27a.

The Sixth Circuit did not address the issue presented by Petitioner, namely, whether it should review the District Court's factual conclusions under a Rule 52 standard or a Rule 56 standard.

The Sixth Circuit then concluded, as a matter of law, that claims for money damages or injunctive relief will, except in unusual circumstances, not be barred by laches if they are brought within the three year limitations period established by the Copyright Act.

Applying a de novo standard of review, the Sixth Circuit first determined the availability of the laches defense in a copyright infringement case as it relates to the Copyright Act's explicit three year statute of limitations provision, 17 U.S.C. §507(b). Again, applying a de novo standard of review, the appellate court reversed the district court's judgment, but affirmed the district court's determination that Plaintiffs' inordinate lengthy delay in filing this suit makes any effort to procure the destruction of buildings already occupied, sold, or substantially constructed unduly prejudicial to Defendants. App. at 35a-36a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Did Not Apply The Wrong Standard Of Review

Petitioner's first reason for seeking a writ makes no sense under the record below. Petitioner argues that the Sixth Circuit should have used the standard of review applicable to factual findings under Rule 52, F.R.Civ.P.

This ignores what the District Court decided and what the Sixth Circuit decided.

The District Court did not purport to use its equitable powers to determine an equitable remedy; instead it decided a summary judgment motion in case seeking statutory remedies under the Copyright Act. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir. 2002) ("Although a district court can make factual findings related to laches after a bench trial, the court should not make factual findings when addressing a summary judgment motion based on laches. Rather than deferring to district court's finding of fact, we view the record in the light most favorable to Dr. Jacobsen." [internal citations omitted]).

The Sixth Circuit decided to use a *de novo* standard of review because it was deciding a threshold issue of law. Petitioner cites no cases which apply some other standard for deciding threshold legal issues, even when reviewing factual findings made pursuant to Rule 52. On the contrary, as this Court explained in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984):

> Rule 52(a) applies to findings of fact, including those described as "ultimate facts" because they may determine the outcome of litigation. But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. [Citation omitted.]

See also Overton Distribs., Inc. v. Heritage Bank, 340 F.3d 361, 365-66 (6th Cir.2003) ("This court reviews the district

court's conclusions of law de novo and findings of fact for clear error").

Even the cases cited by Petitioners demonstrate that the abuse of discretion standard applies only where the District Court makes equitable determinations based on undisputed facts. The abuse of discretion standard does not apply to cases reviewing an order granting summary judgment where the district court has inappropriately resolved disputed factual issues and make errors of law. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir.2002) ("whether the district court inappropriately resolved any disputed material facts in reaching its decision" is reviewed under the de novo standard that traditionally governs summary judgment review).[1]

II. The Sixth Circuit Correctly Recognized That Laches Cannot Bar The Claims For Monetary and Injunctive Relief, But It Erroneously Concluded That Courts Can Disregard Statutory Limitations Periods In Extraordinary Situations

Respondents agree that the Sixth Circuit got it wrong in an important respect. Respondents, however, do not believe that the Sixth Circuit's legal error merits review by this Court at this time because the Sixth Circuit remanded for further proceedings which may moot any review by this Court.

---

[1] *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir.1999) ("our review of the record is de novo in determining whether there are any disputed issues of material fact").

A. The Statute Of Limitations Under The Copyright Act

Section 507(b) of the Copyright Act, 17 U.S.C. § 507(b), provides:

> (b) Civil Actions. — No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

B. Laches Should Not Be Available In This Case Because The Complaint Was Filed With The Statutory Limitations Period

As this Court stated in *Holmberg*, 327 U.S. at 395:

> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.

See also United States v. Mack, 295 U.S. 480, 489 (1934) ("[L]aches within the term of the statute of limitations is no defense at law."); *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 244-245 n. 16 (1985) ("application of the equitable defense of laches in an action at law would be novel indeed").[2]

---

[2] This principle has been applied in a variety of other statutory contexts. *See, e.g., Ashley v. Boyle's Famous Corned Beef Co*, 66 F.3d 164, 170 (8th Cir.1995) (Title VII and Equal Pay Act claims), where the Eighth Circuit stated that "separation of powers principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of limitations." The Eight Circuit stated that an express

The Sixth Circuit called the language in *Holmberg* dicta, and, instead, fashioned its own rule which recognized that, most of the time, laches would not bar claims brought within the statutory limitations period. However, it decided that, in extraordinary circumstances, "the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand." App. at 36a.

Nevermind that the Sixth Circuit never explained how it determined what the legislative drafters envisioned, the Sixth Circuit provides no guidance for deciding what is an "unusual case" where laches should be allowed to trump the legislative's limitations period.

The Sixth Circuit found support in decisions of other circuits which also allowed laches to trump the statutory limitations period in extraordinary circumstances. *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 950-951 (10th Cir. 2002) ("courts should generally defer to the three-year statute of limitations"), and *Danjaq LLC v. Sony Corporation,* 263 F.3d 942, 954 (9th Cir. 2001) ("If a defendant can show harm from the delay, the court may, in extraordinary circumstances, defeat the claim based on laches, though the claim is within the analogous limitations period").

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limitations period "reflect[s] a legislative 'value judgment'" striking the appropriate balance between the interests promoted by the statute and countervailing interests of repose. *Ashley*, 66 F.3d at 169 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975). *See also Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 586 (9th Cir.1993) ("[b]ecause Congress provided a statute of limitations to govern ADEA actions . . . [those] claims cannot be barred by laches"), *cert. denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994).)

The Sixth Circuit also recognized, but did not adopt the bright-line rule, adopted by the Fourth Circuit in *Lyons Partnership LP v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001):

> In *Lyons*, the Fourth Circuit observed:
>
> > While we agree with Lyons that the district court erred as a matter of law when it found that laches barred Lyons' claims, both legal and equitable, we do so for more fundamental reasons. First, laches is a doctrine that applies only in equity to bar equitable actions, not at law to bar legal actions. Second, we note that, in any event, in connection with the copyright claims, separation of powers principles dictate that an equitable timeliness rule adopted by courts cannot bar claims that are brought within the legislatively prescribed statute of limitations. Finally, even in equity under the Lanham Act, laches does not bar a claim for prospective injunctive relief. [243 F.3d at 797]

Because the Sixth Circuit remanded for further proceedings which may render review by this Court moot or premature, the court should not grant the petition.

However, if the Court does so, it should reverse the Sixth Circuit and declare, as a matter of law, what it has previously stated in *Holmberg*:

> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive.

III. Defendants' Calculation Of Delay Distorts The Record And Ignores The Lengthy Period That The District Court Kept The Summary Judgment Motions Under Advisement

While not directly relevant to whether the petition should be granted, Petitioner offers a grossly misleading description of the evidence relating to delay. Therefore, pursuant to Supreme Court Rule 15, Respondents are compelled to explain why the delay — within the limitations period — was appropriate in the circumstances.

Defendants contend that Plaintiffs waited 2 years and 1 month after first learning about the Jonathan's Landing project before filing the Second Lawsuit. But this is grossly misleading.

First, and most obviously, this contention ignores the fact that the summary judgment motions were pending for almost 10 months; and Respondents knew that there would be summary judgments for many months before those motions were filed. By reasonably awaiting a decision on the summary motions in the First Lawsuit before they commencing suit on the Howell project, Plaintiffs promoted efficiency and judicial economy. The plans and buildings at issue were virtually identical. Plaintiffs reasonably concluded that a decision on the Waterford project would provide guidance which, if the District Court ruled in plaintiffs' favor, might lead to settlement of all issues between Plaintiffs and Defendants and, if the District Court ruled in Defendants' favor, might cause Plaintiffs to forego further litigation.

Second, Defendants' calculation of the alleged 2 year and 1 month delay starts at the wrong beginning. Defendants' relied on a FOIA request which discovered that Defendants

had sought approval for their project. Approval of a project is quite different than construction of a project. Until Defendants actually commenced construction, it would have been uneconomical for Plaintiffs to pursue litigation — especially when the rights in the copyrighted plans and architectural works were already being litigated.

In *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 456 F.Supp. 531, 534 (S.D.N.Y.1977), *aff'd*, 592 F.2d 651 (2d Cir.1978), the rights to a Scott Joplin song had been wrongfully assigned to a publishing company in 1959. Counsel for the plaintiff trust learned about the assignment in 1967. The publishing company released a recording of the song in 1974. The court held that the trust was not barred by laches from pursuing an infringement claim. It explained in part that the trust's delay was not unreasonable, because "[c]ounsel to the Trust could have reasonably concluded that," prior to the time the movie "The Sting" brought Joplin's works to prominence, "enforcement of the copyright was not worth the cost of litigation, especially because no infringing phonograph record was on the market." 465 F.Supp. at 534.

Here, Plaintiffs wanted to prevent infringing construction. Seeking site approval based on the infringing plans did not necessarily mean that Defendants would actually construct condominiums based on those infringing plans, especially while a lawsuit challenging Defendants' infringing construction of the Waterford project was pending. Prematurely suing merely because Defendants had sought site plan approval would almost surely have occasioned costly litigation raising issues of ripeness and damages.

Under the circumstances, Defendants were not unreasonable when they waited until the District Court

decided the summary judgment motions in the First Lawsuit before commencing the Second Lawsuit. At a minimum, whether Defendants were unreasonable created a factual issue which could not be resolved by summary judgment. *See Kourtis v. Cameron*, 419 F.3d 989, 999 (9th Cir. 2005) (because a claim of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible of resolution by summary judgment); *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1028 (Fed.Cir.1992) (emphasizing that the party claiming laches must prove both unreasonable and inexcusable delay and observing that delay in filing patent infringement suit may be excused by host of factors, including involvement in other litigation).

CONCLUSION

The petition for a writ of certiorari should be denied. If the Court grants the petition, it should limit review to the question whether laches can bar a claim for statutory remedies brought within the statutory limitations period.

Respectfully Submitted,

Stephen Wasinger
Counsel of Record
STEPHEN F. WASINGER PLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, MI 48073
(248) 554-6304
sfw@sfwlaw.co
Attorneys for Respondents

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